original

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2007 JUN 21 P 4:17
BY RONALD R. CARPENTER
CLERK

82225-5
36935-4
No. ~~79812-5~~

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE, and PROTECT OUR WATERS,
Appellants

and

WASHINGTON DENTAL SERVICE FOUNDATION, LLC, Respondent.

APPELLANTS' OPENING BRIEF

Gerald B. Steel
Gerald B. Steel, PE
Attorneys for Appellants Our Water-
Our Choice and Protect Our Waters.

Gerald Steel PE
7303 Young Rd. NW
Olympia, WA 98502
(360) 867-1166
(360) 867-1166 FAX
geraldsteel@yahoo.com
WSBA No. 31084

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Washington State Constitutional Provisions

Page	
12, 27, 29	Article XI, Section 11

Statutes

Page	
32	RCW 4.84.010
12, 26, 27, 28 29, 30	Chapter 35.88 RCW
27	RCW 35.88.010
27, 28	RCW 35.88.020
9	RCW 35.11.020
8, 14, 15	RCW 35.17.240 through 35.17.360
2, 4, 5, 8, 12 14, 15	RCW 35.17.290
9, 26	Title 35A RCW
4	RCW 35A.01.040(4)
9, 29	RCW 35A.11.020
8, 14	RCW 35A.11.090
8, 9, 14, 15	RCW 35A.11.100
9	RCW 35A.11.110
12, 26	RCW 35A.70.070
27	RCW 35A.70.070(6)
28, 30	Chapter 70.142 RCW
28	RCW 70.142.010
31	RCW 70.142.010(2)

I. INTRODUCTION

This case involves pre-election review of two proposed initiative ordinances filed on September 8, 2006 in the City of Port Angeles. It is becoming common for local legislative bodies to seek to protect their turf at the taxpayers' expense by forcing citizens proposing initiatives to go to court to defend these initiatives in pre-election review. It is not uncommon for local jurisdiction lawyers to seek to broaden the court's pre-election inquiry into the validity of any proposed initiative ordinances. This makes the local initiative process unnecessarily expensive and time consuming and serves as an effective barrier to the democratic use of this local initiative process. This does not serve the interests of the people of this state.

We ask that this Court clarify in terms that cannot be misunderstood by local jurisdiction lawyers and trial courts, that pre-election review of whether a proposed ordinance is beyond the scope of the initiative power is intended to be a very limited review and intended only to determine if the fundamental and overriding purpose of the proposed ordinance is legislative and is within the legislative authority granted to the city or county as a corporate entity.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

No. 1. The trial court erred when it failed to accept the POW and OWOC proposed undisputed Finding of Fact 3.20 which states:

> There are other public water systems besides the Port Angeles municipal water system that provide water service in the City of Port Angeles.

See ACP[1] at 45.

No. 2. The trial court erred when it found in Paragraph 5.1 of the Judgment[2] at 10 (ACP at 34) and also summarized in the Judgment at 2 (ACP at 26):

> that the Medical Independence Act and the Water Additives Safety Act are invalid as exceeding the scope of the local initiative power because the initiatives affect administrative rather than legislative matters, because the initiatives deal with matters delegated specifically to the legislative body of the City of Port Angeles, and because the ordinances proposed by the initiatives are beyond the authority of the City of Port Angeles to enact.

---

[1] The full record consists of Clerk's Papers and Verbatim Reports of Proceedings. "ACP" refers to Appellants Clerk's Papers. "Amended ACP" refers to the Amended Appellants Clerk's Papers that consists of a full copy (four pages) of the Third Declaration of Gerald Steel. "RCP" refers to the Respondents Clerk's Papers (Supplemental Designation of Clerk's Papers by Respondent Washington Dental Service Foundation, LLC). RP1 refers to the first Verbatim Report of Proceedings (December 11, 2006) and RP2 refers to the second Verbatim Report of Proceedings (January 19, 2007).

[2] The Judgment ("Findings of Fact, Conclusions of Law, and Judgment") under review (ACP at 25-35) was issued on January 19, 2007 by the Honorable M. Karlynn Haberly of the Kitsap County Superior Court, visiting judge to the Clallam County Superior Court. A copy of the Judgment is provided herein in Appendix A.

No. 3. The trial court erred when, in Paragraph 5.2 of the Judgment at 10 (ACP at 34), also summarized in the Judgment at 2 (ACP at 26), it dismissed with prejudice the "Petition Pursuant to RCW 35.17.290" brought by POW and OWOC finding that because the proposed initiatives are invalid, there is no requirement for the City of Port Angeles to act to place the initiatives on the ballot.

No. 4. The trial court erred in Conclusion of Law 4.1.

No. 5. The trial court erred in Conclusion of Law 4.1.1.

No. 6. The trial court erred in Conclusion of Law 4.1.2.

No. 7. The trial court erred in Conclusion of Law 4.1.3.

No. 8. The trial court erred in Conclusion of Law 4.2.

No. 9. The trial court erred in Conclusion of Law 4.3.

No. 10. The trial court erred in Conclusion of Law 4.4.

No. 11. The trial court erred in Conclusion of Law 4.5.

No. 12. The trial court erred in Conclusion of Law 4.6.

No. 13. The trial court erred in Conclusion of Law 4.7.

B. <u>Issues Pertaining to Assignments of Error</u>

No. 1. Should this Court cause a decree to be issued, pursuant to RCW 35.17.290, ordering an election to be held in the City of Port Angeles on the Protect Our Waters initiative ordinance and/or the Our Waters-Our Choice initiative ordinance? (Assignments of Error 1 - 13)

No. 2. In pre-election review, to determine whether a proposed initiative for a city is within the legislative authority granted to the city as a corporate entity, does the court limit its subject matter review to the "fundamental and overriding purpose" of the **local** initiative in the same manner that it does for a **statewide** initiative (see Coppernoll v. Reed, 155 Wn.2d 290, 297-303, 119 P.3d 318 (2005))? (Assignments of Error 2-13).

No. 3. Is the subject matter in the Protect Our Waters initiative ordinance and/or the Our Water-Our Choice initiative ordinance proper for direct legislation and not beyond the scope of the local initiative power? (Assignments of Error 1-13)

III. STATEMENT OF THE CASE

A. Statement of Procedural History of the Case

On September 8, 2006 and September 11, 2006, Appellant POW filed initiative petitions to have the Port Angeles City Council enact an ordinance or submit to a vote of the residents of the City the "Water Additives Safety Act." Stipulation and Order at 1, Paragraph 1 (ACP at 145); Judgment at 4-6, Findings of Fact 3.2, 3.5, and 3.10 (ACP at 28-30); POW initiative petition (ACP at 177-78). A copy of the "Stipulation and Order (1) Consolidating Actions; (2) Permitting Intervention; (3) Forwarding Initiative Petitions to County Auditor; and (4) Setting Hearing Schedule and Trial Date" (ACP at 145-49) is provided herein in Appendix B. A copy of the POW initiative petition (ACP at 177-78) with a copy of the proposed "Water Additives Safety Act" (ACP at 178) is provided herein in Appendix C.

Also on September 8, 2006 and September 12, 2006, Appellant OWOC filed initiative petitions to have the Port Angeles City Council enact an ordinance or submit to a vote of the residents of the City the "Medical Independence Act." Stipulation and Order at 2, Paragraph 2 (ACP at 146); Judgment at 4-6, Findings of Fact 3.2, 3.4, and 3.10 (ACP at 28-30); OWOC initiative petition (ACP at 171-72). A copy of the OWOC initiative petition (ACP at 171-72) with a copy of the proposed "Medical Independence Act" (ACP at 172) is provided herein in Appendix D.

The City failed to submit the POW and OWOC initiative petitions to the County Auditor by September 13, 2006.[3] Judgment at 6-7, Findings of Fact 3.17, 3.11, and 3.12 (ACP at 30-31). In response, on September 19, 2006, POW and OWOC filed a Complaint for Writ of Mandamus and Petition Pursuant to RCW 35.17.290 under Clallam County Superior Court Cause No. 06-2-00828-9. Judgment at 6, Finding of Fact 3.13 (ACP at 30); Judgment at 3, Paragraph 2.1 (ACP at 27); POW and OWOC Complaint (ACP at 179-88).

The POW and OWOC Writ of Mandamus sought to compel the City Clerk to submit the initiative petitions to the County Auditor. Judgment at 6, Finding of Fact 3.13 (ACP at 30); POW and OWOC Complaint at 1-2 (ACP at 179-80). The POW and OWOC Petition Pursuant to RCW

---

[3] September 13, 2006 was three working days after September 8, 2006. RCW 35A.01.040(4) provides, in part:

> Within three working days after the filing of a petition, the officer with whom the petition is filed shall transmit the petition to the county auditor for petitions signed by registered voters

35.17.290 sought to have the court find the POW and OWOC initiative petitions sufficient and to procure a decree ordering an election to be held in the City for the purpose of voting upon the proposed ordinances.[4] Stipulation and Order at 2, Paragraph 5 (ACP at 146); POW and OWOC Complaint at 2, Paragraph 1.2 (ACP at 180).

On September 18, 2006, the City filed a Complaint for Declaratory Judgment under Clallam County Superior Court Cause No. 06-2-00823-8. Stipulation and Order at 2, Paragraph 4 (ACP at 146); Judgment at 6, Finding of Fact 3.13 (ACP at 30); City's Complaint (ACP at 5-22). The City requested a declaration that the initiatives are beyond the scope of the initiative power for noncharter Code cities such as the City of Port Angeles. Judgment at 3, Paragraph 2.1 (ACP at 27); Stipulation and Order at 2, Paragraph 4 (ACP at 146).

On September 26, 2006, a Stipulation and Order was filed that consolidated the two cases under Clallam County Superior Court Cause No. 06-2-00828-9. Stipulation and Order at 1 (ACP at 145); Stipulation and Order at 4-5, Paragraph 1 (ACP at 148-49); Judgment at 3, Paragraph 2.1 (ACP at 27). In signing the Stipulation and Order, the City agreed to

---

[4] The full text of RCW 35.17.290 is:

> If the clerk finds the petition insufficient or if the commission refuses either to pass an initiative ordinance or order an election thereon, any taxpayer may commence an action in the superior court against the city and procure a decree ordering an election to be held in the city for the purpose of voting upon the proposed ordinance if the court finds the petition to be sufficient.

"promptly forward the POW and OWOC initiative petitions to the County Auditor for determination of sufficiency." Stipulation and Order at 2, Paragraph 8 (ACP at 146); Judgment at 7, Finding of Fact 3.18 (ACP at 31). The stipulated order made Washington Dental Service Foundation, LCC, ("WDSF") a party in Cause No. 06-2-00828-9. Stipulation and Order at 4-5, Paragraph 2 (ACP at 148-49); Judgment at 3-4, Finding of Fact 3.1 (ACP at 27-28). The stipulated order suspended the City's legal obligation regarding the initiative petitions until the trial court issued its order on January 19, 2007. Stipulation and Order at 4-5, Paragraph 3 (ACP at 148-49); Judgment at 3-4, Finding of Fact 3.1 (ACP at 27-28). The Stipulation and Order set the schedule. Stipulation and Order at 4-5, Paragraphs 4-5 (ACP at 148-49); Judgment at 3-4, Finding of Fact 3.1 (ACP at 27-28).

The hearing on the merits and trial was held before the Honorable M. Karlynn Haberly on Monday, December 11, 2006. Judgment at 3-4, Paragraph 2.2 and Finding of Fact 3.2 (ACP 27-28); RP1 at 1. The City was represented by William E. Bloor, City Attorney for the City of Port Angeles, POW and OWOC were represented by Gerald Steel, P.E., attorney at law, and WDSF was represented by Roger A. Pearce and Foster Pepper PLLC. Judgment at 3, Paragraph 2.2 (ACP at 27).

The trial court based its judgment on undisputed facts.

> Procedurally, each of the parties submitted opening, response and reply briefs accompanied by declarations and exhibits. The Stipulation and Order contemplated a hearing on the merits, which was scheduled for December 11, 2006, and a final order. Accordingly, the Court treats the hearing as a trial on undisputed facts. Even though the parties did not submit a set of stipulated facts, the following relevant facts were undisputed and, based on these undisputed facts, the initiative petitions filed by Our

> Water-Our Choice and Protect Our Waters (attached to those parties' Verified Application for Peremptory Writ), and the Agreement Regarding Gift of Fluoridation System (attached to the City's Complaint For Declaratory Judgment), the Court enters the final judgment herein.

Judgment at 4, Finding of Fact 3.2 (ACP at 28).

WDSF submitted a motion to dismiss and motion for judgment on the pleadings and the trial court subsumed those motions in its ruling on the merits. Judgment at 10, Paragraph 5.3 (ACP at 34).

A presentation of the proposed Judgment was held on January 19, 2007. RP2 at 1. POW and OWOC presented exceptions to those proposed findings prepared by the City and WDSF. RP2 at 2-3. The exceptions presented by POW and OWOC are in the record. ACP at 38-49. In particular, POW and OWOC argued for one additional Finding of Fact:

> 3.20 There are other public water systems besides the Port Angeles municipal water system that provide water service in the City of Port Angeles.

ACP at 45; RP2 at 14-19. The proposed finding was not accepted by the trial court. RP2 at 19.

POW and OWOC filed a Notice of Appeal to Supreme Court with the Clallam County Superior Court on February 12, 2007. ACP 23-35.

B. Statement of the Facts of the Case

This case is based on undisputed facts. Judgment at 4, Finding of Fact 3.2 (ACP at 28). POW and OWOC filed initiative petitions with the City on September 8, 2006. Supra, this brief at 3-4. On October 7, 2006, the County Auditor found the initiative petitions to be sufficient and sent letters back to the City Clerk stating, "[t]he required number of signatures has been

met, thus allowing submission to the voters at an election to be determined." Judgment at 7, Finding of Fact 3.18 (ACP at 31).

The City failed to comply with the statutory requirements for processing initiative petitions. Supra, this brief at 4. In response, POW and OWOC filed a "Petition Pursuant to RCW 35.17.290" to force the City to hold an election on the initiative ordinances. Supra this brief at 4-5. RCW 35.17.290 provides that if the City:

> refuses either to pass an initiative ordinance or order an election thereon, any taxpayer may commence an action in the superior court against the city and procure a decree ordering an election to be held in the city for the purpose of voting upon the proposed ordinance if the court finds the petition to be sufficient.

RCW 35.17.290.[5] POW includes Ann Mathewson, its treasurer. Judgment at 5, Finding of Fact 3.5 (ACP at 29). Ann Mathewson is a taxpayer of the City. Id. OWOC includes Lynne Warber, its campaign chair. Judgment at 4, Finding of Fact 3.4 (ACP at 28). Lynne Warber is also a taxpayer of the City. Id.

Instead of complying with the statutory requirements for processing initiative petitions, the City filed a Complaint for Declaratory Judgment requesting a declaration that the initiatives are beyond the scope of the initiative power. Judgment at 3, Paragraph 2.1 (ACP at 27); Judgment at 6, Finding of Fact 3.12 (ACP at 30).

---

[5] Initiative powers are exercised in a noncharter Code city pursuant to RCW 35A.11.100 "in the manner set forth for the commission form of government in RCW 35.17.240 through 35.17.360" with exceptions in RCW 35A.11.090 not herein relevant and with a reduced number of voter signatures required. RCW 35A.11.100.

The City is a Code city operating under Title 35A RCW and pursuant to authority in RCW 35A.11.020[6], the City has operated a drinking water utility since 1924. Judgment at 4, Finding of Fact 3.3 (ACP at 28); Judgment at 6, Finding of Fact 3.15 (ACP at 30). The City has made numerous significant and substantial decisions in the operation of its municipal water system. Judgment at 6-7, Findings of Fact 3.15 and 3.16 (ACP at 30-31). The City is not a county and its population is less than 125,000. Judgment at 7, Finding of Fact 3.19 (ACP at 31).

In 2003, the City Council passed a motion to approve fluoridation of the City's water supply. Judgment at 5, Finding of Fact 3.7 (ACP at 29). In 2005, WDSF entered a contract ("Agreement," Appendix E herein) with the City wherein WDSF paid for the design, construction, and installation of a fluoridation system and the City agreed to fluoridate its municipal public water supply for ten years unless it is prevented from doing so by a court order. Judgment at 5, Finding of Fact 3.8 (ACP at 29); Agreement at 5, Paragraph 5.5 (ACP at 18). If the City fails to meet its obligations under the Agreement, the City has agreed to repay WDSF for its expenses for design, construction, and installation of the fluoridation system up to $433,000. Judgment at 5, Finding of Fact 3.8 (ACP at 29); Agreement at 6, Paragraph 5.9 (ACP at 19). WDSF delivered the fluoridation system to the City in May, 2006 and the City is currently fluoridating its municipal public water system. Judgment at 5, Finding of Fact 3.9 (ACP at 29).

---

[6] Finding of Fact 3.3 erroneously references RCW 35.11.020 instead of RCW 35A.11.020. Similarly, Finding of Fact 3.11 erroneously references RCW 35A.11.110 instead of RCW 35A.11.100.

The full text of the undisputed facts accepted by the trial court appear in the Judgment at 3-7, Findings of Fact 3.1 to 3.19, (ACP 27-31) (Appendix A herein). In addition, the trial court relied upon the initiative petition filed by POW (ACP at 177-78, Appendix C herein), the initiative petition filed by OWOC (ACP at 171-72, Appendix D herein), and the Agreement (ACP at 14-22, Appendix E herein). Judgment at 4, Finding of Fact 3.2 (ACP at 28).

C. Additional Undisputed Finding of Fact

POW and OWOC proposed Finding of Fact 3.20:

> 3.20 There are other public water systems besides the Port Angeles municipal water system that provide water service in the City of Port Angeles.

This finding of fact was proposed in the POW and OWOC exceptions at the January 19, 2007 presentation of findings of fact, conclusions of law, and judgment. ACP at 45; RP2 at 14-19. This finding was not accepted by the trial court. RP2 at 19.

At the December 11, 2006 trial, WDSF admitted that the small non-municipal water system that provides water service in the City of Port Angeles that is described in the Second Declaration of Gerald Steel (ACP at 71-90) "is a public drinking water system." RP1 at 85. In further support of this proposed finding, Gerald Steel presented two letters to the trial court on January 19, 2007. RP2 at 15-16.[7] The first letter reports that PUD #1 of Clallam County provides public water service to an estimated 46 customers inside the City of Port Angeles. Amended ACP at 51A. The second letter

---

[7] The trial court allowed these letters to be filed with the Clerk but did not accept them. RP2 at 19, lines 6-8. These letters were filed in the Third Declaration of Gerald Steel. Amended ACP at 50-51B.

reports that the Dry Creek Water Association, Inc. provides public water service to an estimated 31 customers inside the City of Port Angeles. Amended ACP at 51B. The City admitted to the facts presented in these letters. RP2 at 18, lines 5-10 (referring to the letters, the City states "Technically, they are correct."). The WDSF stated,

> Just very briefly, in our reply briefs we didn't say that the City was only served by the City's public water system. We said that there may be other water systems, like small well systems, but we didn't think it was material to the issues before the court.

RP2 at 18, lines 17-23. In the Argument section of this brief, POW and OWOC will explain why the presence of these other water systems serving the City is material to the issues before this Court.

IV. SUMMARY OF ARGUMENT

In pre-election review of a proposed local initiative ordinance, this Court should limit its substantive review to a review of the fundamental and overriding purpose of the proposed ordinance in the same manner that it reviews a statewide initiative. This Court should find that a city initiative is not beyond the scope of the local initiative power if:

1) The fundamental and overriding purpose of the initiative is legislative and not administrative;

2) The fundamental and overriding purpose of the ordinance is within the legislative authority granted to the city as a corporate entity.

In pre-election review this Court should refrain from otherwise inquiring into the validity of the initiative before it has been enacted.

Under this standard, this Court should find that the proposed initiative ordinances are within the scope of the local initiative power because:

1) They enact new permanent general law that is applicable to all public water systems that serve the City now or in the future which makes them legislative enactments; and,

2). They exercise authority provided to the corporate City both by Article XI, Section 11 of the Washington State Constitution (police power) and by RCW 35A.70.070 and Chapter 35.88 RCW which explicitly give the corporate City the right to adopt strict local water purity standards for all public water systems serving the inhabitants of the City.

After finding that the proposed initiative ordinances are within the scope of the local initiative power, then pursuant to the authority in RCW 35.17.290, this Court should cause the City to act to place the initiative ordinances on the ballot so that the citizens of Port Angeles are not deprived of their lawful initiative powers.

V. ARGUMENT

A. Standard of Review

This case was decided by the trial court on undisputed facts. Supra, this brief at 7. This case includes challenges to all of the trial court's conclusions of law and to the judgment based on these conclusions of law. Supra this brief at 1-3. Issues of law are reviewed de novo by this Court. In re Electric Lightwave, Inc., 123 Wn.2d 530, 536, 869 P.2d 1045 (1994).

POW and OWOC do not challenge the validity of the undisputed facts relied upon by the trial court. However, the trial court refused to include in its decision the POW and OWOC proposed Finding of Fact 3.20:

> There are other public water systems besides the Port Angeles municipal water system that provide water service in the City of Port Angeles.

Supra, this brief at 10-11. POW and OWOC request that this Court accept this finding based on the undisputed facts in the record.

Appellate courts can make their own findings based on the undisputed evidence in the record. State v. Reite, 46 Wn. App. 7, 11, 728 P.2d 625 (1986). An undisputed fact is "a fact disclosed in the record or pleadings that the party against whom the fact is to operate either has admitted or has conceded to be undisputed." Heriot v. Smith, 35 Wn. App. 496, 502, 668 P.2d 589 (1983). When a case is based on undisputed facts, the appellate court "has the duty to determine for itself the proper conclusions of law to be drawn from the evidence in the case." Seattle v. Shepherd, 93 Wn.2d 861, 867, 613 P.2d 1158 (1980).

The City and WDSF have admitted that there are other public water systems besides the Port Angeles municipal water system that provide water service in the City of Port Angeles. Supra, this brief at 10-11. Therefore this qualifies as an undisputed fact. Heriot v. Smith, 35 Wn. App. 496, 502, 668 P.2d 589 (1983).

The City and WDSF have argued that this fact, while undisputed, is not material. RP2 at 17, lines 6-8; RP2 at 18, lines 18-25, and at 19, line 1. In Subsections D and E of this Argument (Infra, this brief at 20-32) POW and OWOC will explain why this fact is material. Because this fact is undisputed

and material, the trial court abused its discretion by not including this admitted fact in its Findings of Fact. Abuse of discretion occurs when a trial court makes a decision for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

This Court need not reach the issue of abuse of discretion by the trial court, because this Court can make its own findings based on the undisputed facts and admissions in the record. Supra, this brief at 12-14.

B. Issue 1: A Decree Should Be Issued, Pursuant to RCW 35.17.290, Ordering an Election To Be Held in the City of Port Angeles on the Protect Our Waters Initiative Ordinance and the Our Water-Our Choice Initiative Ordinance

In their Petition Pursuant to RCW 35.17.290, POW and OWOC request a court-issued decree ordering an election to be held in the City for the purpose of voting upon the proposed POW and OWOC initiative ordinances. ACP at 187-88, Paragraph 8.11. POW and OWOC include taxpayers of the City. Supra, this brief at 8. Port Angeles is a noncharter Code city. Supra, this brief at 5.

Initiative powers are exercised in a noncharter Code city pursuant to RCW 35A.11.100 "in the manner set forth for the commission form of government in RCW 35.17.240 through 35.17.360" with exceptions in RCW 35A.11.090 not herein relevant and with a reduced number of voter signatures required.

> Except as provided in RCW 35A.11.090, and except that the number of registered voters needed to sign a petition for initiative or referendum shall be fifteen percent of the total number of names of persons listed as registered voters within the city on the day of the last preceding city general election, the powers of initiative and referendum in noncharter code cities shall be exercised in the manner

> set forth for the commission form of government in RCW 35.17.240 through 35.17.360, as now or hereafter amended.

RCW 35A.11.100.

RCW 35.17.290 provides that if the City:

> refuses either to pass an initiative ordinance or order an election thereon, any taxpayer may commence an action in the superior court against the city and procure a decree ordering an election to be held in the city for the purpose of voting upon the proposed ordinance if the court finds the petition to be sufficient.

RCW 35.17.290. The County Auditor found the initiative petitions to be sufficient. Supra, this brief at 7-8. To date the City has refused to pass the POW and OWOC initiative ordinances and refused to order an election thereon.[8]

The trial court dismissed the POW and OWOC Petition Pursuant to RCW 35.17.290 because it ruled that the proposed initiatives are invalid. Judgment at 10, Paragraph 5.2 (ACP at 34). The trial court ruled that the proposed initiatives are invalid because it found that the initiative ordinances exceeded the scope of the local initiative power. Judgment at 10, Paragraph 5.1 (ACP at 34). However, as will be shown in the next subsections of this brief, the trial court erred when it found the proposed initiative ordinances exceeded the local initiative power. Because the proposed initiatives are

---

[8] Initially, the City refused to comply with the statutory requirement to submit the POW and OWOC initiative petitions to the County Auditor for a determination of sufficiency. Supra, this brief at 4. In a Stipulation and Order filed on September 26, 2006, POW and OWOC agreed that the County would not have any further legal obligations regarding the POW and OWOC initiative petitions until the trial court ruled, in exchange for the City's agreement to submit the initiative petitions to the County Auditor. Stipulation and Order at 2, Paragraphs 8-9 (ACP at 146). The trial court ruled on January 19, 2007. ACP at 34.

valid, the trial court erred when if failed to order the City to act to place the initiative ordinances on the ballot.

POW and OWOC request that this Court enter a decree ordering the City to act to place the initiative ordinances on the ballot after this Court has ruled that, for pre-election review, these initiatives are not beyond the scope of the local initiative power. Alternately, POW and OWOC request that this Court rule that these initiatives are not beyond the scope of the local initiative power and remand the case to the trial court for issuance of a decree consistent with this Court's ruling.

C. Issue 2: In Pre-election Review the Court Limits Review to the "Fundamental and Overriding Purpose" of a Local Initiative in the Same Manner That It Does For a Statewide Initiative

Conclusions of Law 4.1, 4.1.1, 4.1.2, and 4.1.3 are erroneous because they do not limit substantive pre-election review to the "fundamental and overriding purpose" of the local initiative. Conclusions of Law 4.1, 4.1.1, 4.1.2, and 4.1.3 are in the Judgment at 7-8 (ACP at 31-32).

> It has been a longstanding rule of our jurisprudence that we refrain from inquiring into the validity of a proposed law, including an initiative or referendum, before it has been enacted. Seattle Bldg. & Constr. Trades Coun. v. City of Seattle, 94 Wn.2d 740, 745, 620 P.2d 82 (1980) . . . We have recognized two narrow exceptions to this general rule against preelection review. The availability of these exceptions depends upon the type of review sought.

Coppernoll v. Reed (Coppernoll), 155 Wn.2d 290, 297, 119 P.3d 318 (2005). Coppernoll involves a challenge to a statewide initiative. Coppernoll at 292-93. But the citation relied upon in Coppernoll is from a challenge to a local initiative.

> It is the general policy of this court to refrain from inquiring into the validity of a proposed law, including an initiative or referendum, before it has been enacted. Courts offer a number of reasons for this rule, among them that the courts should not interfere in the electoral and legislative processes, and that the courts should not render advisory opinions. However, the courts will take cognizance of certain objections to an initiative measure, and one of these is that the proposed law is beyond the scope of the initiative power.

Seattle Bldg. & Constr. Trades Coun. v. City of Seattle (Seattle), 94 Wn.2d 740, 745-46, 620 P.2d 82 (1980) (citations omitted).[9]

Coppernoll continued to identify the "two narrow exceptions" where pre-election review is allowed. The first is a challenge that "the procedural requirements for placing the measure on the ballot have not been met" and the second is that "the subject matter is not proper for direct legislation." Coppernoll at 297. Only this second narrow exception is relevant in the instant case.

Coppernoll is careful to distinguish between an allowed challenge that the subject matter is not proper for direct legislation, and a substantive invalidity challenge that is disallowed by the Coppernoll and Seattle Courts because these Courts refrain from inquiring into the validity of a proposed law, including an initiative before it has been enacted. See Coppernoll at

---

[9] The Seattle Court found that Seattle could not consider an initiative ordinance that sought local control over a limited access state highway when state law did not allow local control over such highways. This precedent was followed in Philadelphia II v. Gregoire ("Philadelphia II"), 128 Wn.2d 707, 719, 911 P.2d 389 (1996) in determining that a state initiative could not exercise authority that goes beyond the jurisdiction of the state. But in both Seattle and Philadelphia II, these Courts were clear that generally courts do not "rule on the validity of an initiative before its adoption by the people" so as "not to interfere in the electoral process or give advisory opinions." Philadelphia II at 719; Seattle at 745-46. These Courts do not consider "substantive invalidity" in pre-election review. Coppernoll at 297-306.

297; see also Seattle Bldg. & Constr. Trades Coun. at 745-46 (supra, this brief at 16-17). The Coppernoll Court explains that when a court reviews whether the initiative is within the jurisdiction's power to enact, it looks only to the "fundamental and overriding purpose" of the initiative rather than to mere incidentals to the overriding purpose.

> In Philadelphia II, we used a two part test to determine whether the initiative exceeded the legislative power. "{I}n order to be a valid initiative, {an initiative} must be legislative in nature and enact a law that is within the [jurisdiction's] power to enact." . . . . We looked at the "fundamental and overriding purpose" of the initiative, rather than mere "incidental{s}" to the overriding purpose.
> . . . . .
> In adherence to our prior decisions, we therefore restrict analysis of [the initiative] to determining if its "fundamental and overriding purpose" is within the [jurisdiction's] power to enact.

Coppernoll at 302-03 (punctuation except for [ ] in original). For a city initiative, a successful review that the initiative is within the jurisdiction's power to enact includes a determination that the power exercised was granted to the city as a corporate entity.

> To determine whether a city ordinance is subject to the initiative power, the court must determine whether the measure is a legislative or administrative act and whether the power exercised in the initiative was granted to the city as a corporate entity or exclusively to the legislative authority of the city.

City of Seattle v. Yes for Seattle, 122 Wn. App. 382, 387, 93 P.3d 176 (2004) citing to Lince v. City of Bremerton, 25 Wn. App. 309, 311, 607 P.2d 329 (1980).

A challenge that the subject matter is not proper for direct legislation is also referred to as a challenge that the initiative is beyond the scope of the initiative power.

> As we recently affirmed in Coppernoll v. Reed, 155 Wn.2d 290, 299, 119 P.3d 318 (2005), preelection challenges regarding the scope of the initiative power address the fundamental question of whether the subject matter of the measure was "proper for direct legislation."

City of Sequim v. Malkasian, 157 Wn.2d 251, 255, 138 P.3d 943 (2006).

> Where the subject matter of an initiative is beyond the scope of the initiative power, it is not "proper for direct legislation."

Id. at 260.

In conclusion, to determine if an initiative is beyond the scope of the initiative power, this Court should apply the two part test from Philadelphia II (Philadelphia II v. Gregoire, 128 Wn.2d 707, 719, 911 P.2d 389 (1996)). This two part test came from the Seattle Court's analysis of a local initiative.

> Not only must the proposed initiative be legislative in nature, but it must be within the authority of the jurisdiction passing the measure. Seattle Bldg. & Constr. Trades Council, 94 Wn.2d at 747.

Philadelphia II at 719; see Coppernoll at 302. To determine if a city initiative is "within the authority of the jurisdiction passing the measure" this Court should only review the "fundamental and overriding purpose" of the initiative to determine if this purpose is within the legislative authority granted to the city as a corporate entity. Supra, this brief at 16-18. This Court should not review mere incidentals in the proposed ordinance. Id.

Therefore in resolving this issue, this Court should rule that in pre-election review, to determine whether a proposed legislative initiative for a city is within the authority granted to the city as a corporate entity, this Court will limit its subject matter review to the "fundamental and overriding

purpose" of the local initiative in the same manner that it does for a statewide initiative.

D. Issue 3: The Subject Matter in the POW and OWOC Initiative Ordinances Is Proper for Direct Legislation and Not Beyond the Scope of the Local Initiative Power

The final issue in this case is whether the subject matter in the POW and OWOC initiative ordinances is proper for direct legislation and not beyond the scope of the local initiative power. As discussed in the previous subsection, this Court should limit its subject matter review to the "fundamental and overriding purpose" of the City initiatives. When reviewing the "fundamental and overriding purpose" of a non-charter Code city initiative, this Court should determine that the initiative is not beyond the scope of the initiative power if:

1) The fundamental and overriding purpose of the initiative is legislative and not administrative;

2) The fundamental and overriding purpose of the ordinance is within the legislative authority granted to the city as a corporate entity.

Supra, this brief at 16-20. The trial court erred in its Conclusions of Law and Judgment because it did not limit its review to the fundamental and overriding purpose of the proposed initiative ordinances.

1. The fundamental and overriding purpose of the proposed ordinances is to prohibit pollution of the water supplies of all public water systems in the City and to protect health and safety

The fundamental and overriding purpose of the POW proposed ordinance (ACP at 178 - Appendix C herein) is to prohibit pollution of all public water systems serving the City and to protect health and safety by only allowing medication to be added to the supply water of any public water system when certain criteria related to health, safety, and water purity are met. The fundamental and overriding purpose of the OWOC proposed ordinance (ACP at 172 - Appendix D herein) is to prohibit pollution of all public water systems serving the City and to protect health and safety by prohibiting medications from being added to the supply water of any of those public water systems. Neither proposed ordinance regulates additives intended to make water safe and potable. ACP at 172, Section 3; ACP at 178, Section 3(C).

The POW proposed ordinance is titled the "Water Additives Safety Act." ACP 178. The Water Additives Safety Act addresses all substances used to medicate citizens. This proposed ordinance applies to all of the many public water systems serving the City and not just to the City's municipal water supply. The intent of the Water Additives Safety Act is to require any substances which are added to any public water supply with the intention of treating people, not the water, to meet existing health-based standards which protect the entire population, including infants, the infirm and the elderly over their lifetime. Id., Section 1.

The Water Additives Safety Act prohibits adding substances intended to treat people, to any public water supply serving the City without approval by the FDA[10] for the substance being safe and effective. Id., Section (3)(A).

> A person or entity shall not add any substance to a public drinking water supply with the intent to treat or affect the physical or mental functions of the body of any person or which is intended to act as a medication for humans unless the manufacturer, producer, or supplier provides proof that the substance is specifically approved by the United States Food and Drug Administration ("FDA") for safety and effectiveness with a margin of safety that is protective against all adverse health and cosmetic effects at all dosage ranges consistent with unrestricted human water consumption.

Id. This proposed ordinance does not put any requirements on the FDA, but rather prohibits the use of medication being delivered in any public water supply serving the City unless the FDA has given approval. The consequence of FDA not addressing the issue is that the medication may not be added to the water in any of the public water supplies serving the City.

A medicating substance may not be pure and may contain contaminants. The proposed ordinance also regulates the amount of contaminants that may be added to the water during the process of adding an approved medicating substance. Id., Sections 2 and 3. Again the result of not being able to meet the contaminant restrictions would prohibit that particular formulation of that approved medicating substance from being added to any public water supply serving the City. Violations of the proposed ordinance are punishable as a gross misdemeanor. Id., Section 4. The proposed ordinance clarifies that the City's municipal water supply is not exempt from

---

[10] United States Food and Drug Administration.

the general requirements of the ordinance. Id., Section 5. The Water Additives Safety Act includes a severance clause. Id., Section 6.

The OWOC proposed ordinance is titled the "Medical Independence Act." ACP 172 (Appendix D herein). The Medical Independence Act also addresses all substances used to medicate citizens. This proposed ordinance also applies to all of the many public water systems serving the City and not just to the City's municipal water supply.

Section 1 of the Medical Independence Act declares the intent of the proposed ordinance: "The citizens of Port Angeles now declare that public water supplies should not be used to medicate citizens." ACP 172, Section 1. While the background in this section documents as an example that the City has introduced medication into the public water supply operated by the City, the clear intent of the proposed ordinance is to ban medications from all public water supplies that serve people in the City. Id. The proposed ordinance makes it unlawful to use any of the several public water systems serving the city to medicate citizens. Id., Section 2. The proposed ordinance makes it clear that it is not unlawful to add chemicals to make water safe and potable in any public water system serving the city. Id., Section 3. The proposed ordinance clarifies that the City's municipal water supply is not exempt from the general requirements of the ordinance. Id., Section 5. Finally the ordinance includes a severance clause. Id., Section 6.

2. The proposed ordinances are legislative and not administrative

Initiative and referendum extend only to matters that are legislative in character. Citizens v. Spokane, 99 Wn.2d 339, 347, 662 P.2d 845 (1983).

> Several criteria have been suggested for determining whether an act is legislative or administrative. One such is whether the subject is of a permanent and general character (legislative) or of temporary and special character (administrative). We believe a preferable standard, at least for this case, to be whether the proposition is one to make new law or declare a new policy, or merely to carry out and execute law or policy already in existence.

Ballasiotes v. Gardner, 97 Wn.2d 191, 196, 642 P.2d 397 (1982). Or in a restatement:

> Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative. . . .
>
> The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.

Id.

The trial court erred when it found that the proposed initiatives are administrative. See Judgment at 8, Conclusion of Law 4.2 (ACP at 32). The ordinances establish new law for the City for the purpose of regulating the purity of the water supply for all public water systems serving the City. There currently is no City ordinance that regulates the purity of all public water systems in the City. The proposed ordinances set new policy for water purity in the City and establish new regulations to enforce the new policy. The proposed ordinances create permanent laws. These laws are general in nature because they create water supply purity standards for all public water systems in the City.

In Citizens v. Spokane ("Citizens"), 99 Wn. 2d 339, 662 P.2d 845 (1983), Spokane had established a business tax on utility companies. When Spokane decided to establish a business tax on all business, the Citizens Court ruled, "Common sense compels the conclusion that a tax on 'all' business is a new policy" and therefore a legislative decision. Citizens at 348. In the instant case, new local water purity standards that apply to all public water systems that serve the City is a new policy and a new law. Because these new ordinances are also permanent and general in character, they should be found to be legislative actions that are appropriate for initiative.

The trial court concluded that the proposed ordinances are administrative because they regulate the operation of the City's municipal water system. Judgment at 8, Conclusion of Law 4.2. The trial court errs because the fundamental and overriding purpose of the ordinances is to regulate all public water systems that serve people in the City. The fact that City's water system will have to comply with these general regulations does not make the regulations administrative. The adoption of a new comprehensive land use plan and implementing zoning regulations is a legislative decision. Leonard v. Bothell, 87 Wn.2d 847, 850, 557 P.2d 1306 (1976). The fact that the City's water system will have to comply with these new land use regulations does not make the decision to adopt the comprehensive plan and implementing regulations an administrative act.

Generally, the proposed initiative ordinances create a new plan to establish local water purity standards for all public water systems in the City

including but not limited to the City's municipal water system. These proposed initiative ordinances are legislative enactments.

3. The authority to set citywide water purity standards is a power granted to the corporate city and therefor is suitable for initiative

It is well-settled that powers must be granted to the city as a corporate entity in order for those powers to be subject to initiative. City of Sequim v. Malkasian, 157 Wn.2d 251, 261-62, 138 P.3d 943 (2006). If powers are granted exclusively to the "legislative body" of a city and if it is necessary for the city to conduct complicated proceedings in order to satisfy the intent of the Legislature, then these powers are not subject to initiative. Id.

The authority to set citywide water purity standards is a power granted to corporate Code cities.

The City of Port Angeles is a Code city operating under Title 35A RCW. Judgment at 4, Finding of Fact 3.3 (ACP at 28). Title 35A RCW provides that the corporate city has the following power:

> **Every code city** may exercise the powers authorized . . .
> . . . .
> (6) exercise control over water pollution as provided in chapter **35.88 RCW**.

RCW 35A.70.070 (emphasis supplied) (copy of relevant laws provided in Appendix F herein). **Chapter 35.88 RCW** explicitly provides that the corporate city may regulate the purity of water supplied to the city:

> **Every city** and town may by ordinance prescribe what acts shall constitute offenses against the purity of its water supply.

RCW 35.88.020 (emphasis supplied).[11, 12]

This regulatory power given to the corporate city by Chapter 35.88 RCW regulates all public water systems that serve or will serve the city. RCW 35.88.010 ("protecting . . . the sources of supply from which the cities and towns or the companies or individuals furnishing water to the inhabitants thereof obtain their supply of water, or store or conduct it").[13]

---

[11] The Water Additives Safety Act explicitly declares that this proposed ordinance is adopted pursuant to RCW 35A.70.070(6) and RCW 35.88.020 as well as under the general police power of the City granted to the corporate city by Article XI, Section 11 of the State Constitution ("Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws"). ACP at 178, Third Whereas Clause. The Medical Independence Act is authorized by the same authorities.

[12] RCW 35.88.020 as amended to remove gender references by ESB 5063 (effective 7/22/07) provides in full: Every city and town may by ordinance prescribe what acts shall constitute offenses against the purity of its water supply and the punishment or penalties therefor and enforce them. The mayor of each city and town may appoint special police officers, with such compensation as the city or town may fix, who shall, after taking oath, have the powers of constables, and who may arrest with or without warrant any person committing, within the territory over which any city or town is given jurisdiction by this chapter, any offense declared by law or by ordinance, against the purity of the water supply, or which violate any rule or regulation lawfully promulgated by the state board of health for the protection of the purity of such water supply. Every special police officer whose appointment is authorized herein may take any person arrested for any such offense or violation before any court having jurisdiction thereof to be proceeded with according to law. Every such special police officer shall, when on duty wear in plain view a badge or shield bearing the words "special police" and the name of the city or town by which he or she has been appointed.

[13] RCW 35.88.010 states in full: For the purpose of protecting the water furnished to the inhabitants of cities and towns from pollution, cities and towns are given jurisdiction over all property occupied by the works, reservoirs, systems, springs, branches and pipes, by means of which, and of all the lakes, rivers, springs, streams, creeks, or tributaries constituting the sources of supply from which the cities and towns or the companies or individuals furnishing water to the inhabitants thereof obtain their supply of water, or store or conduct it, and over all property acquired for any of the

RCW 70.142.010 authorizes the State Board of Health to "adopt by rule a maximum contaminant level for water provided to consumers' taps." However, this only establishes a maximum contaminant level. While it may prevent a city from accepting higher contaminant levels, it does not prevent a city from setting lower, stricter, contaminate levels for water supplied inside the city. RCW 35.88.020 explicitly provides for enforcement "for any offense declared by law or by ordinance, against the purity of the water supply, or which violate any rule or regulation lawfully promulgated by the state board of health for the protection of the purity of such water supply." Supra, this brief at 27, Note 12.

Chapters 70.142 RCW and 35.88 RCW should be harmonized to give effect to both statutes. State v. Smalls, 99 Wn.2d 755, 765, 665 P.2d 384 (1983) ("statutes should be harmonized whenever possible, and an interpretation which gives effect to both provisions is the preferred interpretation").

This Court should find that the State Board of Health is authorized by RCW 70.142.010 (Appendix F herein) to promulgate statewide water purity rules that set maximum contamination levels but that a city is authorized by RCW 35.88.020 to adopt a stricter local water purity ordinance.

Because local regulation of the purity of public water supplies is within the City's corporate power and because the proposed ordinances are

---

foregoing works or purposes or for the preservation and protection of the purity of the water supply, and over all property within the areas draining into the lakes, rivers, springs, streams, creeks, or tributaries constituting the sources of supply whether they or any of them are within the city or town limits or outside.

legislative, the two initiative ordinances are within the scope of the initiative power.

The trial court erroneously relied on RCW 35A.11.020 which gives the legislative body of the City the right to operate a municipal water system. The trial court erred because the initiative ordinances do not seek to operate the municipal water system but instead seek to pass general regulations under the authority of Chapter 35.88 RCW and under the police power authority in Article XI, Section 11 of the Washington Constitution, to control water purity for all public water systems in the City. The City is free to operate its municipal water system in any manner that is consistent with the general laws of the city, state and federal governments.

4. The fundamental and overriding purpose of the initiative ordinances is within the authority of the City as a corporate entity

The analysis in the previous subsections demonstrates that the fundamental and overriding purpose of the initiative ordinances is legislative and it is within the authority of the City as a corporate entity. Supra, this brief at 20-29. Based on this analysis, this Court should find that the proposed initiative ordinances are not beyond the scope of the local initiative power. The trial court errs in its Conclusions of Law 4.4, 4.5, 4.6, and 4.7. See Judgment at 8-10 (ACP 32-34).

The trial court erred in adopting Conclusion of Law 4.4 because the trial court erroneously characterizes the purpose of the initiative ordinances as seeking to direct the operation of the City's municipal water system instead of seeking to establish stricter water purity standards for all public water systems that supply water to people in the City. Supra, this brief at 20-26.

Conclusion of Law 4.4 is also in error because it claims non-existent conflict with federally mandated and state administered regulation of public drinking water. See ACP at 32-33. The trial court erroneously reaches this conclusion because it did not seek to harmonize Chapter 70.142 RCW with Chapter 35.88 RCW. Supra, this brief at 28. The trial court errs when it concludes in Conclusion of Law 4.4 that the state preempted the field for setting maximum permissible concentrations for additives to drinking water.[14] See ACP at 33. This conclusion, as well, is based on the trial court's failure to harmonize Chapter 70.142 RCW with Chapter 35.88 RCW. Supra, this brief at 28.

The trial court errs in Conclusion of Law 4.5 for two reasons. See ACP at 33. First, the trial court exceeds the scope of pre-election review when it rules on "mere incidentals to the overriding purpose" of the Water Additives Safety Act. Supra, this brief at 17-19. Second, the proposed ordinance does not put any requirements on the FDA. Supra, this brief at 22.

The trial court errs in Conclusion of Law 4.6. See ACP at 33. First, while the City does not have authority to regulate public drinking water in a manner inconsistent with controlling state and federal regulation, the fundamental and overriding purpose of the ordinance is not inconsistent with

---

[14] Preemption occurs when the legislature either expressly or by necessary implication states its intention to preempt the field, or when a state statute and local ordinance are in such direct conflict they cannot be reconciled. Margola Associates v. Seattle, 121 Wn.2d 625, 652, 854 P.2d 23 (1993). Preemption has not occurred. Chapter 70.142 RCW gives certain rights to the State Board of Health but does not take the existing rights away from cities to pass stricter water purity standards.

controlling state and federal regulations.[15] Supra, this brief at 28-30. Second, the trial court exceeds the scope of pre-election review when it rules on "mere incidentals to the overriding purpose" of the Medical Independence Act. Supra, this brief at 17-19.

The trial court errs in Conclusion of Law 4.7 for two reasons. See ACP at 33-34. First, the property right issue is a mere incidental to the overriding purpose of the Medical Independence Act and so the trial court has exceeded the scope of pre-election review. Supra, this brief at 17-19. Second, the language of the Medical Independence Act does not establish a new property right. The challenged sentence states:

> The citizens herewith determine that access to a public water supply constitutes a property right shared by all users of that water supply.

ACP at 172, Section 1. This sentence should be interpreted that if a person is a legal user of a public water supply, they have a right to some access to that water supply. It is hard to imagine how a person could be a legal user of a water supply without having any access to that water supply. This sentence does not establish a new property right but expresses a common sense idea. Nevertheless, for the first reason given, this issue is beyond the scope of pre-election review.

---

[15] RCW 70.142.010(2) provides, "State and local standards for chemical contaminants may be more strict than the federal standards."

E. POW and OWOC Request That This Court Make Its Own Finding of Fact That There Are Multiple Public Water Systems Serving People in the City

It is an undisputed fact that there are multiple public water systems serving people in the City. Supra, this brief at 10-14. This undisputed fact is material to the instant case. The proposed initiative ordinances set water purity standards for all public water systems that are now serving the City or that will serve the City in the future. ACP at 172 and 178. POW and OWOC request a finding that there are multiple water systems serving the City. Supra, this brief at 13-14.

F. POW and OWOC Request Costs If They Prevail on Appeal

POW and OWOC request costs pursuant to RCW 4.84.010 if they prevail on appeal.

VI. CONCLUSION

POW and OWOC have demonstrated that in pre-election review that an initiative should be found within the scope of the local initiative power when the fundamental and overriding purpose of the initiative is legislative and when this fundamental and overriding purpose is within the legislative authority granted to the City as a corporate entity. Supra, this brief at 16-20. POW and OWOC have further demonstrated that the proposed initiative ordinances meet this standard. It is requested that this Court find that the proposed ordinances are within the scope of the initiative power.

When the proposed ordinances are found within the scope of the initiative power, POW and OWOC request that this Court cause the City to act to place the initiative ordinances on the ballot so that the people of Port

Angeles can exercise their corporate right to set stricter controls on water purity for all of the public water systems that serve people in the City now or in the future. As it states in the fourth Whereas clause in the Water Additives Safety Act (ACP at 178),

> [T]he citizens of Port Angeles, taking great pride in the pristine water of this area, desire to enact the following ordinance to ensure the healthfulness and aesthetic qualities of its water for all of its citizens.

POW and OWOC request that this Court recognize the citizens' right to vote on these initiatives.

Dated this 21st day of June, 2007.

Respectfully submitted,

GERALD STEEL PE

By: _____

Gerald B. Steel
WSBA No. 31084
Attorneys for POW and OWOC

CERTIFICATE OF SERVICE

I certify that on the 21st day of June, 2007, I caused a true and correct copy of this certificate and Appellants' Opening Brief to be served on the following by first class mail:

Counsel for Washington Dental Service Foundation, LLC:

Roger Pearce/P. Steven DiJulio
Foster Pepper PLLC
1111 Third Ave., Ste. 3400
Seattle, WA 98101-3299

Counsel for the City of Port Angeles:

William Bloor
Port Angeles City Attorney
P.O. Box 1150
Port Angeles, WA 98362

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2007 JUN 21 P 4:17
BY RONALD R. CARPENTER
CLERK

Dated this 21st day of June, 2007, at Olympia, Washington.

Gerald Steel

OWOC6a17.07

APPENDIX A - JUDGMENT

The Honorable M. Karlynn Haberly
Kitsap County Superior Court
Trial Date: Monday, December 11, 2006, 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CLALLAM COUNTY

CITY OF PORT ANGELES,

Plaintiff,

v.

OUR WATER-OUR CHOICE, and PROTECT OUR WATERS,

Defendants,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,

A Party in Interest,

OUR WATER-OUR CHOICE, and PROTECT OUR WATERS,

Plaintiffs/Petitioners,

v.

PORT ANGELES CITY CLERK, CITY OF PORT ANGELES, and WASHINGTON DENTAL SERVICE FOUNDATION, LLC,

Defendants/Respondents

No. 06-2-00828-9

(Having been consolidated with No. 06-2-00823-8)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

ORIGINAL

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

A-1

1. JUDGMENT SUMMARY

PREVAILING PARTIES:	City of Port Angeles Washington Dental Service Foundation, LLC
ATTORNEYS FOR PREVAILING PARTIES	William E. Bloor, City Attorney 321 East Fifth Street/PO Box 1150 Port Angeles WA 98362-0217 For City of Port Angeles Foster Pepper PLLC by Roger A. Pearce and P. Stephen DiJulio 1111 Third Avenue, Suite 3400 Seattle WA 98101-3299 For Washington Dental Service Foundation, LLC
NON-PREVAILING PARTIES	Our Water – Our Choice Protect Our Waters
ATTORNEY FOR NON-PREVAILING PARTIES	Gerald Steel, PE 7303 Young Road NW Olympia WA 98502
SYNOPSIS OF JUDGMENT:	Declaratory Judgment GRANTED in favor of Prevailing Parties that the initiatives entitled Medical Independence Act and Water Additives Safety Act are beyond the scope of the local initiative power of the City of Port Angeles, and that the City has no duty to place said initiatives on the ballot; Writ of Mandamus sought by Non-Prevailing Parties is DENIED; Complaint for Writ of Mandamus and Petition Pursuant to RCW 35.17.290 brought by Non-Prevailing Parties is DISMISSED with prejudice.
AMOUNT OF MONETARY JUDGMENT	$0.00 (Not Applicable)
ATTORNEYS' FEES AND COSTS	$0.00 (Not Requested by Prevailing Parties)

////

////

////

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

2. INTRODUCTION

2.1 Consolidated Cases. This case consists of two consolidated actions involving initiative petitions filed by political action committees Our Water - Our Choice and Protect Our Waters with the City Clerk of the City of Port Angeles. The City of Port Angeles filed a Complaint For Declaratory Judgment under Clallam County Cause No. 06-2-00823-8, in which the City requested a declaration that the initiatives are beyond the scope of the initiative power for noncharter Code cities such as the City of Port Angeles. Protect Our Waters and Our Water – Our Choice filed a Complaint For Writ Of Mandamus and Petition Pursuant to RCW 35.17.290 and also filed a Verified Application For Peremptory Writ Of Mandamus To The Port Angeles City Clerk And Request For Further Relief ("Verified Application") under Clallam County Cause No. 06-2-00828-9, in which the political action committees requested the Court to find the initiative petitions legally sufficient and to order the City to hold an election for the purpose of voting on the ordinances proposed in the initiatives. The Court consolidated the two actions (Cause Nos. 06-2-00823-8 and 06-2-00828-9) for all purposes under the later-filed cause number (Cause No. 06-2-00828-9).

2.2 Hearing On The Merits. At the hearing on the merits on December 11, 2006, the City was represented by William E. Bloor, City Attorney for the City of Port Angeles, Our Water – Our Choice and Protect Our Waters were represented by Gerald Steel, P.E., attorney at law, and the Washington Dental Service Foundation was represented by Roger A. Pearce and Foster Pepper PLLC. After its review of the evidence submitted in the form of declarations by the parties, the briefing of the parties, the arguments of counsel at the hearing on the merits, and the pleadings and papers in the court record, the Court entered its oral ruling on December 11, 2006, and now enters the following:

3. FINDINGS OF FACT

3.1. In September 2006 shortly after the two actions were filed, the parties entered into a Stipulation and Order (1) Consolidating Actions, (2) Permitting Intervention, (3) Forwarding

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

Initiative Petitions to County Auditor, and (4) Setting Hearing Schedule and Trial Date ("Stipulation and Order"). In the Stipulation and Order, the Court consolidated the two actions for all purposes; joined Washington State Dental Service Foundation as a party defendant, ordered that the City had no further legal obligations with respect to the initiative petitions (the City had stipulated to forward the petitions to the County Auditor for determination of sufficiency) pending the final order of this Court in the consolidated cases, ordered that the parties would follow an agreed-upon briefing schedule, and agreed to schedule a hearing on the merits as soon as possible after November 27, 2006.

3.2. Procedurally, each of the parties submitted opening, response and reply briefs accompanied by declarations and exhibits. The Stipulation and Order contemplated a hearing on the merits, which was scheduled for December 11, 2006, and a final order. Accordingly, the Court treats the hearing as a trial on undisputed facts. Even though the parties did not submit a set of stipulated facts, the following relevant facts were undisputed and, ~~in light of the~~ based on these undisputed facts ~~below~~, the initiative petitions filed by Our Water-Our Choice and Protect Our Waters (attached to those parties' Verified Application For Peremptory Writ), and the Agreement Regarding Gift of Fluoridation System (attached to the City's Complaint For Declaratory Judgment), the Court ~~may enter~~ enters the final judgment herein.

3.3. The City of Port Angeles (the "City") is a Code city operating under RCW Title 35A. Pursuant to the authority in Title 35A, the City owns and operates a drinking water utility. RCW 35.11.020.

3.4. Our Water – Our Choice ("OWOC") is a political action committee registered with the Washington Public Disclosure Commission, listing an address of 1114 E. 4th Street, Port Angeles WA 98362. Lynn Warber is listed as "campaign chair" of OWOC. Lynn Warber is a registered voter and taxpayer of the City, and is the person who filed the proposed Medical Independence Act with the Port Angeles City Clerk.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

A-4

3.5. Protect Our Waters ("POW") is a political action committee registered with the Washington Public Disclosure Commission, listing an address of 1923 W. 6th Street, Port Angeles, WA 98362. Ann Mathewson is listed as treasurer of POW. Ann Mathewson is a registered voter and taxpayer of the City, and is the person who filed the proposed Water Additives Safety Act with the Port Angeles City Clerk.

3.6. Washington Dental Service Foundation, LLC, ("WDSF") is ~~an essential~~ a party to these actions. WDSF has a contract interest that relates to the subject matter of the actions. The contract is between the City and WDSF and is titled Agreement Regarding Gift of Fluoridation System (the "Agreement").

3.7. ~~In February 2003, the Port Angeles City Council held a lengthy public hearing on the question of whether to fluoridate the City's drinking water supply. At least 45 people gave oral testimony, and voluminous documents were presented to the City Council~~. On February 18, 2003, the City Council passed a motion to approve fluoridation of the City's water supply.

3.8. Subsequently, on March 1, 2005, the City Council approved, by motion, a contract between the City and WDSF – the Agreement. Under the Agreement, WDSF agreed to pay for the design, construction and installation of a fluoridation system and then transfer the system to the City. For its part, the City agreed that it would fluoridate the Port Angeles' public water supply for a continuous ten (10) year period. In the event the City fails to meet its obligations under the Agreement, the City is to repay up to four hundred thirty-three thousand ($433,000) to WDSF for the costs of design, construction, and installation of the fluoridation system and could be liable for other expenses.

3.9. WDSF delivered the fluoridation system to the City on May 18, 2006, and the City is currently using the system to fluoridate the City's public water supply.

3.10. On September 8 and September 12, 2006, OWOC and Lynn Warber filed initiative petitions to have the City Council enact an ordinance or in the alternative have the city residents vote on the "Medical Independence Act." On September 8 and September 11, 2006,

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

POW and Ann Mathewson filed initiative petitions to have the City Council enact an ordinance or in the alternative have the city residents vote on the "Water Additives Safety Act."

3.11. Following the filing of the initiative petitions, on September 13, 2006, the City Council conducted a public meeting to consider the action to be taken. The procedure set out in the state statutes is that the City will deliver the petitions to the County Auditor to verify signatures. Then, RCW 35A.11.110 and 35.17.260 provide that in the event the Clallam County Auditor certifies that an initiative petition has received the requisite number of valid signatures, the City Clerk will transmit the initiative to the City Council for introduction. The Council may either: (1) adopt the initiative as an ordinance, or (2) reject it and order it to be placed on the ballot no later than the next election.

3.12. The City Council elected not to send the initiative petitions to the County Auditor, but rather to ask for a declaratory judgment regarding the validity of the two initiative petitions.

3.13. On September 18, 2006, the City filed an action for a declaratory judgment under Clallam County Superior Court Cause No. 06-2-0823-8. On September 19, 2006, the initiative backers, POW and OWOC, filed a separate action under Clallam County Superior Court Cause No. 06-2-00828-9 in which they sought, among other things, relief that would require the City Clerk to deliver the initiative petitions to the County Auditor for validation of signatures.

3.14. In the days following the filing of the two lawsuits, the parties reached agreement on the procedure to be followed. The agreement was intended to facilitate the timely presentation of the substantive issues to the Court for a ruling. The agreed Stipulation and Order was filed in this action on September 26, 2006.

3.15. In 1924 the City made the decision to establish a municipal water system. In 1924 the City purchased the water system from the North Pacific Public Service Company of Tacoma. Since then, the City has operated its municipal water system as a proprietary function of the City. In the course of doing so, the City, administratively, has made numerous significant and substantial changes to the system and the water supplies. These include, among others,

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

changing the source of water from Ennis Creek to Morse Creek; changing the source again from Morse Creek to the Elwha River; negotiating settlements with the EPA and Department of Social and Health Services (now Department of Health (DOH)) over issues of water quality and water treatment; modifying, and sometimes not modifying, treatment facilities; and addressing measures to be taken when the water supply was reclassified from "ground water" to "ground water under the influence of surface water."

3.16. In summary, since 1924 the City has made numerous significant and substantial decisions relating to its municipal water system. It purchased the system, and then moved major components from time to time. It changed primary sources of water. It has chosen to treat, and not treat, the water for various purposes; and it has chosen among alternative means of complying with state regulations for operating the facility.

3.17 The OWOC and POW initiative petitions signed by registered voters were properly submitted to the City Clerk on September 8, 2006. As of September 18, 2006, the City Clerk had failed to transmit the OWOC and POW initiative petitions to the County Auditor.

3.18. Pursuant to the Stipulation And Order, on or about September 26, 2006, the City Clerk forwarded the OWOC and POW initiative petitions to the County Auditor for a determination of sufficiency, and on October 7, 2006, the County Auditor found the initiative petitions to be sufficient and sent letters back to the City Clerk stating, "[t]he required number of signatures has been met, thus allowing submission to the voters at an election to be determined."

3.19. The City of Port Angeles is not a county and is not 125,000 or greater in population.

4. CONCLUSIONS OF LAW

4.1. There are three, independent tests considered by the Court to determine whether the OWOC and POW initiatives are within the scope of the local initiative power and therefore proper to go forward to a vote of the voters of Port Angeles.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

4.1.1. The first test is whether the subject matter of the initiatives deals with legislative rather than administrative matters. Only legislative matters are within the initiative power.

4.1.2. The second test is whether, even if the subject matter is legislative, the authority to deal with that subject matter was expressly delegated to the legislative body of the City rather than to the City as a corporate body. Matters expressly delegated to the local legislative body are not within the local initiative power.

4.1.3. The third test is whether the subject matter of the initiative exceeds the legislative authority of the City. Matters exceeding the local legislative authority are likewise outside the local initiative power.

4.2. With respect to the first test, the Court concludes that each initiative seeks to regulate matters that are administrative in nature, which is the operation of a municipal water system, including operation and supply of water through that municipal water system. Accordingly, the initiatives are beyond the scope of the local initiative power.

4.3. With respect to the second test, under RCW 35A.11.020, the state Legislature has vested within the City of Port Angeles legislative body, which is the Port Angeles City Council, the authority to operate and supply utilities. In this case, the operation of the municipal water system utility is at issue. The Court concludes that these initiatives interfere with the City's operation of its public water system, and seek to regulate the operation of that municipal water system. For this second reason, the initiatives are beyond the scope of the local initiative power.

4.4. The third test is whether either or both of these initiatives exceed the authority of the City Council to enact laws. The Court concludes that both initiatives are beyond that authority. The language of each initiative clearly seeks to direct the City's operation of the municipal water system and manner of supply of public water. The Medical Independence Act seeks to control substances that are put into the water, which is an administrative matter for the City. Both of the initiatives conflict with federally mandated and state administered regulation

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

of public drinking water. In particular, the state has preempted the field for setting maximum permissible concentrations for additives to drinking water. It is the State Board of Health that is legislatively mandated to set standards for contaminants in drinking water based on best available scientific information. RCW 70.142.010 - .030. Only certain local governments may adopt stricter standards – the local health department serving counties with populations of 125,000 or greater may adopt more strict standards, again based on best scientific information. RCW 70.142.040. Because the City is not a county of 125,000 or greater in population, it does not have the authority to adopt stricter standards than the State Board of Health maximum allowable concentration standards; and because the initiatives would adopt stricter standards than the State Board of Health standards, the ordinances proposed by the initiatives are beyond the scope of the local initiative power.

4.5. The Water Additives Safety Act seeks to impose an obligation on the United States FDA to approve substances that are added to public drinking water systems. The City has no authority to direct the FDA to regulate such substances. This also exceeds the authority of the City to regulate public water systems.

4.6. The City does not have authority to regulate public drinking water in a manner inconsistent with the controlling state and federal regulation. ~~The Medical Independence Act is ambiguous. An example is its provisions in Sections 2 and 3 that relate to making water "safe" and whether certain substances are added for "treating" versus "preventing" disease. The ambiguities are not themselves determinative, but despite them, it is clear that the Medical~~ The Medical Independence Act is intended to create new regulations that are, to some extent, inconsistent with state and federal law regulating water quality and water additives. As such it is beyond the scope of the legislative authority of the City and is invalid.

4.7. The Medical Independence Act would also establish a new property right of access to a public water supply, and would transfer that right to all persons using a public water supply. This is in violation of the Washington State Constitution, Article 8, Section 7, which

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

A-9

prohibits gifts of City property without any consideration. The Court notes that this could also subject the City to claims if this new property right affected the security of bond holders for improvements to the City water system. But it is enough for purposes of this litigation to hold that the initiatives would violate the Washington Constitution.

5. JUDGMENT

Based on the foregoing findings of fact and conclusions of law, it is ORDERED, ADJUDGED and DECREED as follows:

5.1. Declaratory judgment is **GRANTED** in favor of the City of Port Angeles that the Medical Independence Act and the Water Additives Safety Act are invalid as exceeding the scope of the local initiative power because the initiatives affect administrative rather than legislative matters, because the initiatives deal with matters delegated specifically to the legislative body of the City of Port Angeles, and because the ordinances proposed by the initiatives are beyond the authority of the City of Port Angeles to enact.

5.2. The Writ of Mandamus sought by the Our Water – Our Choice and Protect Our Waters political action committees is DENIED and the Complaint For Writ Of Mandamus And Petition Pursuant to RCW 35.17.290 brought by Our Water – Our Choice and Protect Our Waters is DISMISSED with prejudice because the proposed initiatives are invalid. Accordingly, there is no requirement for the City of Port Angeles to act to place the initiatives on the ballot.

5.3. The Court finds no need to rule on the motion to dismiss or motion for judgment on the pleadings brought by Washington Dental Service Foundation, LLC, as those motions are subsumed in the foregoing ruling on the merits as to all issues presented to the Court.

DATED this 19th day of January, 2007.

M. KARLYNN HABERLY
Superior Court Judge

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

A-10

Presented by:

Roger A Pearce for
WILLIAM E. BLOOR, WSBA No. 4084
City Attorney for City of Port Angeles
per permission

FOSTER PEPPER PLLC

Roger A Pearce
P. Stephen DiJulio, WSBA No. 7139
Roger A. Pearce, WSBA No. 21113
Attorneys for Washington Dental Service Foundation, LLC

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

APPENDIX B - STIPULATION AND ORDER

FILED
CLALLAM CO CLERK
2006 SEP 26 A 9:21
BARBARA CHRISTENSEN

SUPERIOR COURT OF WASHINGTON IN AND FOR CLALLAM COUNTY

OUR WATER--OUR CHOICE PAC, and PROTECT OUR WATERS PAC, Plaintiffs/Petitioners, v. PORT ANGELES CITY CLERK, and CITY OF PORT ANGELES, Defendants/Respondents.	No. 06-2-00828-9 STIPULATION AND ORDER (1) CONSOLIDATING ACTIONS; (2) PERMITTING INTERVENTION, (3) FORWARDING INITIATIVE PETITIONS TO COUNTY AUDITOR, and (4) SETTING HEARING SCHEDULE AND TRIAL DATE

I. STIPULATION

Plaintiffs/Petitioners, Our Water—Our Choice ("OWOC") and Protect Our Waters ("POW"), by and through their attorney of record, Gerald Steel, PE; Defendants/Respondents, Port Angeles and Port Angeles City Clerk (collectively "City"), by and through the City's attorney of record, William E. Bloor, City Attorney; and Washington Dental Service Foundation, LLC, ('WDSF") by and through its attorneys, Foster Pepper PLLC, P. Stephen DiJulio and Roger A. Pearce, stipulate as follows:

1. On September 8, 2006, and September 11, 2006, POW filed initiative petitions with the City, seeking to have the City Council enact, or submit to a vote of the registered voters of the City, an ordinance entitled the Water Additives Safety Act.

13-1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

2. On September 8, 2006, and September 12, 2006, OWOC filed initiative petitions with the City to have the City Council enact, or submit to a vote of the registered voters of the City, an ordinance entitled the Medical Independence Act.

3. The City and WDSF are parties to an agreement entitled Agreement Regarding Gift of Fluoridation System.

4. On September 18, 2006, the City filed a Complaint for Declaratory Judgment under Clallam County Cause No. 06-2-00823-8. That action seeks a declaration that the initiatives for the Medical Independence Act and the Water Additives Safety Act are beyond the scope of the initiative power. The City named WDSF as a party to the declaratory judgment action.

5. On September 19, 2006, OWOC and POW filed this action under Clallam County Cause No. 06-2-00828-9. This action seeks an order to compel the City Clerk to forward the POW and OWOC initiative petitions to the County Auditor, to find that the initiative petitions are legally sufficient, and to order an election for the purpose of voting on the ordinances proposed in the POW and OWOC initiatives.

6. The actions under Clallam County Cause Nos. 06-2-00823-8 and 06-2-00828-9 involve the same general subject matter and should therefore be consolidated for all purposes.

7. WDSF has an interest that would be affected by the ordinances proposed in the POW and OWOC initiative petitions. WDSF should therefore be joined as a party defendant in Cause No. 06-2-00828-9.

8. No later than Tuesday September 26, 2006, the City will cause the City Clerk to promptly forward the POW and OWOC initiative petitions to the County Auditor for determination of sufficiency.

9. The City has no legal obligation to take further actions with respect to the POW and OWOC initiative petitions, pending the final order of the Superior Court in the consolidated actions under Cause Nos. 06-2-00823-8 and 06-2-00828-9.

B-2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

10. The parties agree that the agreed Order below may be submitted to Clallam Court Commissioner William G. Knebes for signing and entry.

11. The parties agree to the following briefing schedule in the consolidated action:

Opening Briefs of OWOC/POW, City and WDSF	October 13, 2006
Responding Briefs of OWOC/POW, City and WDSF	October 24, 2006
Reply Briefs of OWOC/POW, City and WDSF	November 3, 2006

The parties further agree that service of papers on each other in the consolidated cases may be done by Email or Facsimile, with hard copy to be mailed the same day.

12. The parties agree that the hearing on the merits in the consolidated cases will be set on or as soon as possible after November 27, 2006, and the parties further agree to arrange a date for such hearing before a Superior Court judge for Clallam County or, if necessary, before a visiting Superior Court judge.

So stipulated the 25 day of September 2006.

WILLIAM E. BLOOR, CITY ATTORNEY

William E. Bloor, WSBA No. 4084
Attorney for City of Port Angeles and Port Angeles City Clerk

So stipulated the 21st day of September 2006.

GERALD STEEL, P.E.

Gerald Steel, WSBA No.31084
Attorney for Our Water—Our Choice PAC and
Protect Our Waters PAC

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

So stipulated the 21st day of September 2006.

FOSTER PEPPER PLLC

P. Steven DiJulio, WSBA #7139
Roger A. Pearce, WSBA #21113
Attorneys for Washington Dental Service Foundation, LLC

II. ORDER

Pursuant to the stipulation above, it is hereby ORDERED as follows:

1. The actions under Clallam County Cause Nos. 06-2-00823-8 and 06-2-00828-9 should be, and hereby are, consolidated for all purposes.

2. The Washington Dental Service Foundation is hereby joined as a party defendant in the action under Cause No. 06-2-00828-9.

3. The City shall have no further legal obligations with respect to the POW and OWOC initiative petitions, pending the Superior Court's final order in the consolidated cases under Clallam County Cause Nos. 06-2-00823-8 and 06-2-00828-9.

4. The parties shall abide by the following briefing schedule for all matters raised in Clallam County Cause Nos. 06-2-00823-8 and 06-2-00828-9:

Opening Briefs of OWOC/POW, City and WDSF	October 13, 2006
Responding Briefs of OWOC/POW, City and WDSF	October 24, 2006
Reply Briefs of OWOC/POW, City and WDSF	November 3, 2006

////

////

////

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

5. A hearing on the merits will be scheduled before a Clallam County Superior Court judge or visiting judge on or as soon as possible after November 27, 2006.

SO ORDERED this 25 day of September, 2006.

WILLIAM KNEBES
COURT COMMISSIONER
WILLIAM G. KNEBES
Clallam County Commissioner

Presented by:

GERALD STEEL, P.E.

Gerald Steel, WSBA #31084
Attorney for Our Water—Our Choice PAC and
Protect Our Waters PAC

Agreed; Notice of Presentation Waived:

WILLIAM E. BLOOR, CITY ATTORNEY

William E. Bloor, WSBA #4084
Attorney for City of Port Angeles and
Port Angeles City Clerk

FOSTER PEPPER PLLC

Roger Pearce by Wm. E. Bloor Per Telephone Authorization

P. Steven DiJulio, WSBA #7139
Roger A. Pearce, WSBA #21113
Attorneys for Washington Dental Service Foundation, LLC

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

APPENDIX C - POW INITIATIVE PETITION

061

Sponsored by

PROTECT OUR WATERS

Ann Mathewson, Treasurer
PO Box 2423 Port Angeles, 98362
powowoc@yahoo.com

Ann Mathewson, Treasurer

IMPROVING STANDARDS FOR MEDICATIONS PUT IN PUBLIC DRINKING WATER

INITIATIVE PETITION FOR SUBMISSION TO THE PORT ANGELES CITY COUNCIL

TO: The City Council of the City Of Port Angeles:
We, the undersigned registered voters of the City of Port Angeles, State of Washington, respectfully request that the following ordinance be enacted by the City Council or, if not so enacted, be submitted to a vote of the residents of the City. The proposed title of the said ordinance is the

WATER ADDITIVES SAFETY ACT.

This initiative requires specific safety standards for any substance intended to act on the mind or body of people and added to public drinking water. FDA approval is required. No component of the additive may cause water to exceed existing federal standards determined to protect the health of everyone— infant to aged—for a lifetime. This ordinance does not regulate chemicals added to water to make water safe or potable.

The full text of the ordinance is on the reverse side of this petition.

WARNING: Every person who signs this petition with any other than his or her true name, or who knowingly signs more than one of these petitions, or signs a petition seeking an election when he or she is not a legal voter, or signs a petition when he or she is otherwise not qualified to sign, or who makes herein any false statement, shall be guilty of a misdemeanor.

Each of us for himself or herself says: I am a registered voter of the city of Port Angeles, State of Washington; and my residence address is correctly stated.

Signature as Registered to Vote e.g., Mary Doe, not Mrs. John Doe	PRINT NAME	Date 2006 m/day	Voting Address Number, Street	Port Angeles Zip	Phone
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15					

Return all petitions to Richard T. Smith, Media Contact for Protect Our Waters
82 Island View Rd. Port Angeles, WA 98362 email: rls@olypen.com

[Front of Petition]
C-1

KW

WATER ADDITIVES SAFETY ACT

WHEREAS substances intended to treat or prevent human illness (including tooth decay) are by definition drugs which are mandated by Congress to be regulated by the Food and Drug Administration (FDA),
WHEREAS the FDA as well as the Washington State Department of Health and WAC 246-895-070 all require full disclosure of all components of drugs, which the City has yet to reveal for the formulation currently being added to its drinking water,
WHEREAS under Article 11 SECTION 11 of the State Constitution, RCW 35.88.020 and RCW 35A.70.070(6). The City Of Port Angeles may prescribe what acts shall constitute offenses against the purity of its water supply and exercise control over water pollution, and RCW 70.142.010 (2) expressly states that State and local standards for chemical contaminants may be more strict than the federal standards,
WHEREAS the citizens of Port Angeles, taking great pride in the pristine water of this area, desire to enact the following ordinance to ensure the healthfulness and aesthetic qualities of its water for all of its citizens including infants, the infirm and elderly.
Now, therefore we hereby ordain that the City of Port Angeles add to the Municipal Code:

SECTION 1
Intent: A public drinking water supply is a public resource essential to life and health. Drinking water additives intended to make water safe from microbiologic contaminants and to treat water to control corrosion and other physical properties of the water are accepted. However, the deliberate addition to drinking water of substances intended to treat the mind or body of persons in an entire population is highly controversial. This ordinance requires that any substances which are added with the intention of treating people, not the water, must meet existing health- based standards which protect the entire population, including infants, the infirm and the elderly over their lifetime.

SECTION 2
Definitions:
(A) Substance: A substance may be organic or inorganic in nature and includes drugs as defined in RCW 69.04.009, and RCW 69.41.010(9).
(B) Contaminant: A contaminant is a chemically or physically detectable quantity of any substance other than the named substance which is present in a concentrated formulation intended to be dispensed into drinking water. As used here, the term includes all components including by-products from source materials and their manufacturing process.
(C) "Contaminated with filth" is a term applicable to contaminants taken singly or as a group which are present in a product intended to be added to drinking water and which are present in quantities which would, when dispensed at the manufacturer's Maximum Use Level, allow the final consumer-ready product to exceed for one or more contaminants the Maximum Contaminant Level Goals ("MCLGs") as published by the U.S. Environmental Protection Agency ("EPA")" pursuant to the Federal Drinking Water Act, 42 USC 300f et. seq.

SECTION 3
(A) A person or entity shall not add any substance to a public drinking water supply with the intent to treat or affect the physical or mental functions of the body of any person or which is intended to act as a medication for humans unless the manufacturer, producer, or supplier provides proof that the substance is specifically approved by the United States Food and Drug Administration ("FDA") for safety and effectiveness with a margin of safety that is protective against all adverse health and cosmetic effects at all dosage ranges consistent with unrestricted human water consumption.
(B) It is prohibited to add to a public water supply any substance which is contaminated with filth. No component of the additive mixture shall cause the drinking water to exceed the "MCLGs" determined for that component.
(i) For purposes of determining the specific contaminant contribution under paragraph (B), each shipment of the substance must include its own certificate of independent analysis provided by the manufacturer, producer, or supplier. This certificate must reveal all detectable components in the specific batch of product pursuant to WAC 246-895-070(9). Analysis of the contaminant contribution of each component shall be based on conventional tests made of the undiluted product at the application rate stated by the manufacturer to be the Maximum Use Level. The substance shall not be added to drinking water if it contains any contaminant at a concentration that will cause the drinking water to exceed the MCLG, which is the scientific health-based point of safety established by the U.S. EPA for lifetime consumption of that contaminant in drinking water.
(C) The provisions of this ordinance do not apply to substances which are added to treat water to make water safe or potable PROVIDED that water treatment substances which contain fluoride in amounts sufficient to elevate levels of fluoride in the finished water by more than 0.1 parts per million above background levels shall not be exempted by this subsection.

SECTION 4
Violations of this ordinance constitute a public nuisance and violation of this ordinance shall be punishable as a gross misdemeanor under RCW 70.54.020.

SECTION 5
(A) To the maximum extent permitted by law, this ordinance takes precedence over any conflicting provisions in the laws, regulations, resolutions, or other ordinances of the City of Port Angeles. It does not prohibit fluoridation provided the substance used for that purpose meets the approval of FDA and the stringent safety standards as prescribed herein.
(B) This ordinance is to take effect thirty days after certification of the election in which it was approved by the Port Angeles electorate. Additions of hexafluorosilicic acid solution to the municipal water supply will then cease until proof is publicly available that the substance meets all the criteria set by this ordinance.

SECTION 6
If any provision, phrase, or part of this ordinance or its underlying legal basis, or the application to any person or circumstance is held invalid, the remainder of the provisions of this ordinance or the application thereof shall be given effect insofar as possible, and to this end the provisions of this Act are severable.

[Back of Petition]
C-2

APPENDIX D - OWOC INITIATIVE PETITION

Lynne Lower, treasurer

Sponsored by
OUR WATER– OUR CHOICE!
P O Box 2423, Port Angeles, WA 98362
Campaign Manager Lynn Warber— lynnw@olypen.com

B-250
(R-2)

MASS MEDICATION IS FORCED MEDICATION

VOTE
[X] **YES FOR CHOICE**

INITIATIVE PETITION FOR SUBMISSION TO THE PORT ANGELES CITY COUNCIL

TO: The City Council of the City Of Port Angeles:

We, the undersigned registered voters of the City of Port Angeles, State of Washington, respectfully request that the following ordinance be enacted by the City Council or, if not so enacted, be submitted to a vote of the residents of the City. The proposed title of the said ordinance is the

MEDICAL INDEPENDENCE ACT.

The full text of the ordinance is on the reverse side of this petition.

THE INTENT OF THIS ORDINANCE is to prohibit medication of people through public drinking water supplies while allowing necessary treatment of water to make it safe to drink. People claim the right to control what medication is given them, and a right to their fair share of a public water supply which is free of medication.

WARNING: Every person who signs this petition with any other than his or her true name, or who knowingly signs more than one of these petitions, or signs a petition seeking an election when he or she is not a legal voter, or signs a petition when he or she is otherwise not qualified to sign, or who makes herein any false statement, shall be guilty of a misdemeanor.

Each of us for himself or herself says: I have personally signed this petition; I am a registered voter of the city of Port Angeles, State of Washington and my residence address is correctly stated.

Signature as Registered to Vote e.g., Mary Doe, not Mrs. John Doe	PRINT NAME	Date 2006 m/day	Voting Address Number, Street	Port Angeles Zip	Phone
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15					

Return all petitions, preferably by October 15, 2006 to:
OUR WATER — OUR CHOICE! P O BOX 2423 Port Angeles, WA 98362
powowoc@yahoo.com

[Front of Petition]
D-1

Medical Independence Act

SECTION 1. Intent. Over the objection of many of its citizens, the City Council approved the addition of hexafluorosilicic acid (a form of fluoride) to the City's public drinking water for the express purpose of reducing tooth decay. This action has forced the entire community either to submit to this medication for tooth decay, to remove it as best individuals can, or to not use the water. Extraordinary effort and expense are required to escape being medicated by this substance which is absorbed even through unbroken skin. For many, effective avoidance is an economic and practical impossibility resulting in their enforced medication. The citizens herewith determine that access to a public water supply constitutes a property right shared by all users of that water supply. They find that the property rights of persons to whom medicated water is unacceptable are impaired by addition of medication to the common supply of water and that this is a takings which has not been compensated in any way. Furthermore, the citizens declare that the right of all adult and mentally competent citizens to control their own medical care and the right to informed consent for medical treatment are essential to their pursuit of life and liberty. The citizens of Port Angeles now declare that public water supplies should not be used to medicate citizens.

SECTION 2. It shall be unlawful for any person, agent, or any public water system to put or continue to put any product, substance, or chemical in public water supplies for the purpose of treating physical or mental disease or affecting the structure or functions of the body of any person, or with any other intent of acting in the manner of a preventive or treating medication or drug for humans or animals.

SECTION 3. This ordinance does not apply to substances which are added to treat water to make water safe or potable such as use of agents for disinfection, or corrosion control PROVIDED that water treatment substances contaminated with fluoride in amounts sufficient to elevate levels of fluoride in the finished water by more than 0.1 parts per million above those background levels which occur naturally in the raw supply water shall be prohibited.

SECTION 4. In case of conflict with any law, regulations, resolutions, or ordinances of the City of Port Angeles, this ordinance shall prevail to the maximum extent allowed by law. The action by the City Council taken Feb. 18, 2003 to approve addition of fluoride to the municipal water supply is hereby repealed.

SECTION 5. This ordinance shall take effect thirty days after certification of the election at which it was approved by the Port Angeles electorate. Additions of hexafluorosilicic acid solution to the municipal water supply will then cease.

SECTION 6. If any provision, phrase, or part of this ordinance or its underlying legal basis, or the application to any person or circumstance is held invalid, the remainder of the provisions of this ordinance or the application thereof shall be given effect insofar as possible, and to this end the provisions of this ordinance are severable.

[Back of Petition]
D-2

APPENDIX E - AGREEMENT

AGREEMENT REGARDING GIFT OF FLUORIDATION SYSTEM

This Agreement Regarding Gift of Fluoridation System (the "Agreement") is entered into as of March 1, 2005 (the "Effective Date"), by and between Washington Dental Service Foundation, LLC, a Washington limited liability company ("WDSF"), and the City of Port Angeles, Washington, a municipality (the "City") (collectively referred to herein as the "Parties").

RECITALS

WHEREAS, WDSF is a single member limited liability company of which Washington Dental Service, an organization exempt from federal income tax within the provisions of Section 501(c)(4) of the Internal Revenue Code of 1986, as amended (the "Code"), is the sole member;

WHEREAS, WDSF is organized and operated for charitable purposes including improving the oral health of Washington residents by facilitating the implementation of community fluoridation projects throughout the State of Washington;

WHEREAS, the City is a political subdivision of the State of Washington within the meaning of Section 170(c)(1) of the Code;

WHEREAS, in furtherance of WDSF's charitable mission to improve the oral health of Washington residents, WDSF wishes to make a gift of a fluoridation system (the "System") to the City for the purpose of fluoridating the Port Angeles public water supply, in accordance with the terms and conditions set forth herein;

WHEREAS, the Port Angeles City Council (the "City Council") has determined that it is in the best interests of the City's residents to fluoridate the Port Angeles public water supply, to accept the gift of the System, and to proceed with implementation of a fluoridation system for the City's public water supply;

WHEREAS, the City desires to accept WDSF's gift of the System, in accordance with the terms and conditions set forth herein;

WHEREAS, contemporaneously with this Agreement, WDSF intends to enter into a design-build agreement (the "Design-Build Agreement") with CH2M Hill Constructors, Inc., a Washington corporation ("CH2M Hill"), for the design, construction and installation of the System on land owned by the City;

WHEREAS, WDSF will be responsible for paying the Contract Price for the cost of the design, construction and installation of the System;

WHEREAS, the City is not causing such design, construction and installation to be performed by CH2M Hill through any separate contract or agreement;

WHEREAS, the City is not causing the design, construction and installation of the System to be performed by WDSF through any separate contract or agreement;

WHEREAS, no part of the cost of the design, construction or installation of the System shall

E-1

ever become an obligation of the City; the design, construction and installation of the System will not be executed at the cost of the City and will not by law give rise to a lien or charge on any property of the City;

WHEREAS, it is the Parties' expectation that the System be operational no later than March 1, 2006; and

WHEREAS, WDSF and the City have determined that entering into this Agreement will further the charitable and public service missions of the Parties.

NOW, THEREFORE, in consideration of the mutual promises, covenants, conditions and performances set forth herein, the Parties recite, covenant and agree as follows:

AGREEMENT

ARTICLE I.
PURPOSE

Section 1.1 Purpose. The purpose of this Agreement is to establish the terms and conditions of WDSF's gift of the System to the City, and the City's acceptance of the gift. The City will use the System to implement the City's community water fluoridation project.

ARTICLE II.

SYSTEM TRANSFER

Section 2.1 Gift of System. Subject to and upon the terms and conditions of this Agreement, WDSF agrees and covenants to give, donate, and transfer to the City, at no cost, all of WDSF's right, title and interest in and to the System. WDSF shall transfer the System to the City (a) upon Substantial Completion of the System by CH2M Hill, (b) or otherwise pursuant to Section 5.2 below; provided however, that WDSF shall have ensured prior to any transfer that the System is free of all liens, claims, demands or encumbrances of any kind, legal or equitable that prevent or could prevent WDSF from transferring the System to the City on a free and clear basis. For purposes of this Agreement, the term "Substantial Completion" shall have the same meaning as is assigned in the Design-Build Agreement.

Section 2.2 City's Acceptance of Gift. Subject to and upon the terms and conditions of this Agreement, and except as provided in Section 2.3, the City hereby accepts WDSF's gift of the System and from and after WDSF's transfer of the System to the City at Substantial Completion, or otherwise pursuant to Section 5.2 below, agrees to assume, perform, and fully discharge when due any and all of the liabilities and obligations relating to the operation and ownership of the System, other than those relating to WDSF's payment of the Contract Price, as that term is defined Section 6.2 below, for the costs of the design, construction and installation of the System (the "Assumed Liabilities"). The term "liabilities" includes, but is not limited to, any and all debts, liabilities, and obligations, whether accrued or fixed, absolute or contingent, matured or unmatured, determined or determinable, known or unknown, including those arising under any federal, state, local or foreign statute, law, ordinance, regulation, rule, code, order, writ, stipulation, permit, or other government requirement and those arising under any trade payable, other accounts payable, assigned contract, or

other contract.

Section 2.3 Excluded Liabilities. Assumed Liabilities shall not include WDSF's obligation to pay to CH2M Hill the Contract Price for the design, construction and installation of the System. This Section 2.3 does not, however, in any way limit WDSF's ability to recover any amounts due to WDSF from the City under Section 5.9 or Article VII of this Agreement.

Section 2.4 DISCLAIMER OF WARRANTIES. WDSF IS PROVIDING THE GIFT "AS IS" and "WHERE IS" and WITHOUT WARRANTY OF ANY KIND. WDSF EXPRESSLY DISCLAIMS ALL WARRANTIES, INCLUDING WITHOUT LIMITATION ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NONINFRINGEMENT, AS WELL AS ANY WARRANTY WHATSOEVER WITH RESPECT TO THE MARKETABILITY OR SITE CLASSIFICATION OF THE SYSTEM.

Section 2.5 City Responsibility for System Results and Condition. The City acknowledges that, as between WDSF and the City, after transfer of the System to the City and acceptance of the System by the City, the City has full responsibility for the use and results obtained from the System, and that the entire risk of the System and any use, nonuse or failure of the System is with the City. Without limiting the generality of the foregoing, WDSF will have no liability with respect to: (A) the quality, nature, adequacy and physical condition of the System; (B) the existence, quality, nature, adequacy, and physical condition of utilities serving the System (C) the System's use, habitability, merchantability, or fitness, suitability, value or adequacy of the System for any particular purpose; (D) the zoning or other legal status of the System or any other public or private restrictions on use of the System; (E) the compliance of the assets or the System's operation with any applicable codes, laws, regulations, statutes, ordinances, of any governmental or quasi-governmental entity or any covenants, conditions and restrictions applicable to the System or the fluoridation of a water supply; (F) the presence or absence of hazardous materials on, under or about the System or the adjoining or neighboring property; (G) the quality of any labor and materials used in any improvements on or benefiting the System; (H) the condition of title to the System; (I) the economics of the present or future operation of the System; or (J) the health effects related to the operation of the System. As between WDSF and the City, the City assumes the responsibility and risks of all defects to and conditions in the System, including defects and conditions, if any, that cannot be observed by inspection. WDSF shall not be liable for any latent or patent defects in the System.

Section 2.6 Further Action. Each of the Parties shall execute and deliver such other documents and take such further actions as may be reasonably required or appropriate to carry out the purposes and intents of this Agreement, including but not limited to a transfer agreement and/or bill of sale to effectuate WDSF's transfer of the System to the City at Substantial Completion or pursuant to Section 5.2 below.

ARTICLE III.
LICENSE TO ENTER PREMISES; TRANSFER COSTS

Section 3.1 License to Enter City Premises. The City hereby grants to WDSF and its contractors, including specifically CH2M Hill, a revocable, non exclusive license to enter upon property of the City at the City's landfill property located at 3501 W. 18th Street, Port Angeles, for

E-3

the purpose of designing, installing, constructing and testing the System pursuant to the Design-Build Agreement, but for no other purposes.

Section 3.2 Transfer of System to Permanent Facility. The parties recognize that, due to changes in the City's water system as a result of the Elwha dams removal project, the System may at first be installed in a temporary water treatment facility. If the System is installed in a temporary facility, it will be necessary to transfer the System to a permanent facility at some date in the future. The estimated cost to transfer the System is thirty thousand dollars ($30,000). If the System is installed in a temporary facility, WDSF hereby agrees to reimburse the City for all costs incurred by the City in moving the System to a permanent facility, provided the amount of reimbursement shall not exceed thirty thousand dollars ($30,000) (the "System Transfer Costs").

ARTICLE IV.
CITY'S REPRESENTATIONS AND WARRANTIES

The City hereby represents and warrants as follows.

Section 4.1 The City has the full right, power and authority to enter into this Agreement, to accept WDSF's gift of the System, and to accept all of WDSF's right, title and interest in and to the System upon its transfer by WDSF at Substantial Completion or otherwise pursuant to Section 5.2 below.

Section 4.2 The City's performance hereunder does not violate any agreement between the City and any third party, any obligation owed by the City to any third party, or the rights of any third party.

Section 4.3 Other than litigation or claims that may arise directly as a result of the denial of Protect the Peninsula's Future, Clallam County Citizens for Safe Drinking Water, Barney Munger and Eloise Kailin's State Environmental Protection Act claim, there is no pending claim, action, suit, proceeding, litigation, arbitration, or investigation against the City, and the City is not subject to any continuing injunction, judgment or other order of any court, arbitrator or governmental agency that affects the City's ability to enter into this Agreement or to carry out its obligations set forth herein.

Section 4.4 The City will use the System exclusively for public purposes within the meaning of Section 170(c)(1) of the Code, and the City will not take or fail to take any action that would cause the System to be used for any other purposes.

ARTICLE V.
CITY'S RESPONSIBILITIES

The City agrees and covenants as follows.

Section 5.1 The City shall accept WDSF's transfer of the System and will assume all of WDSF's right title and interest in and to the System at Substantial Completion in accordance with the terms and conditions of this Agreement.

Section 5.2 The City shall accept WDSF's transfer of the System and will assume all of

WDSF's right title and interest in and to the System, in whatever state of completion as the System may exist, in the event of any termination of the Design-Build Agreement prior to Substantial Completion of the System.

Section 5.3 The City shall not take or fail to take any action that will or could prevent its acceptance of WDSF's gift of the System or result in its rejection of the System prior to or after Substantial Completion, as the case may be

Section 5.4 The City shall, alone and in conjunction with CH2M Hill, as required under the Design Build Agreement, use reasonable and good faith efforts to obtain or provide for all consents, approvals or other action by or any registration with, notice to or filing with any person, entity, court or administrative or governmental body required in order to fluoridate the Port Angeles public water supply; and, not later than one hundred eighty (180) days after the earlier of (a) final termination of all legal challenges to fluoridation of the City's water supply or (b) Substantial Completion, the City shall have secured all licenses, permits, registrations and other authorizations required under federal, Washington, or local law necessary to fluoridate the Port Angeles public water supply.

Section 5.5 Upon Substantial Completion and transfer by WDSF of the System, the City shall fluoridate the Port Angeles public water supply for a continuous ten (10) year period, except for reasonable periods of time for normal maintenance or repair or any break in service necessary to switch-over to a future permanent water fluoridation system, and except in the event the City is prevented from fluoridating the Port Angeles public water supply as a result of a court order or other judicial decision.

Section 5.6 As between the City and WDSF, the City shall be responsible for investigating each and every aspect of the System's construction and future operation, including, without limitation: (i) all matters relating to the title, and all governmental and other legal requirements such as taxes, assessments, zoning, use permit requirements, building permit requirements, building codes, and other development requirements; (ii) the physical condition of the System, including, without limitation, the infrastructure available or unavailable to the System (as the case may be), access to the System, all other physical and functional aspects of the System, including the presence or absence of hazardous or toxic materials, substances or wastes of any kind; and (iii) all other matters of any significance affecting the System whether physical in nature or intangible in nature.

Section 5.7 The City hereby agrees, at its cost, to defend with due diligence any lawsuit filed by a third party that has as its goal the temporary or permanent injunction of the operation of the System, including any lawsuit filed as a result of the City's denial of Protect the Peninsula's Future, Clallam County Citizens for Safe Drinking Water, Barney Munger and Eloise Kailin's State Environmental Protection Act claim.

Section 5.8 The City shall designate one or more representatives to work with and to assist CH2M Hill with the design, construction, and installation of the System, as necessary, to ensure that the System meets the requirements of the City and all applicable laws concerning the fluoridation of a public water supply.

E-5

Section 5.9 In the event the City fails to meet any of its obligations under Article IV or Article V, after notice and a thirty (30) day opportunity to cure, the City hereby agrees and covenants to repay WDSF any and all amounts WDSF expends or has expended for or in connection with the design, construction and installation of the System, including without limitation all administrative costs and expenses, legal or other professional fees, personnel time and the System Transfer Costs (the "Repayment Amount"), such Repayment Amount not to exceed $433,000; provided however, that the foregoing limitation on the Repayment Amount shall not relieve or limit the City's obligations to indemnify and hold WDSF harmless under Article VII.

ARTICLE VI.
CONDITIONS TO WDSF GIFT

The Gift is subject to and conditioned upon satisfaction of the conditions listed below, unless waived in writing by WDSF:

Section 6.1 WDSF and CH2M Hill shall have entered into the Design-Build Agreement for the design, construction and installation of the System.

Section 6.2 CH2M Hill and WDSF shall have agreed in writing that the System can and shall be designed, constructed and installed by CH2M Hill for a Contract Price of three hundred forty-three thousand dollars ($343,000), plus Washington State sales taxes (the "Contract Price"). Notwithstanding anything herein to the contrary, in the event a legal proceeding suspends, delays or interrupts all or any part of the design, construction or installation of the System leading to increases in the Contract Price, WDSF hereby agrees to consider paying for all or a part of such increases to the Contract Price; provided, however, that in the event WDSF determines not to pay for such increases to the Contract Price, WDSF shall have no further obligation to the City or duty under this Agreement. In that event, WDSF shall have the right in its discretion to terminate the Design-Build Agreement and transfer the System to the City pursuant to Section 5.2 above.

Section 6.3 As of the Effective Date of this Agreement, the City shall have provided to WDSF written documentation evidencing formal action of the Port Angeles City Council authorizing and approving the City's entry into this Agreement.

Section 6.4 CH2M Hill and the City shall have secured all permits and complied with all requirements of any applicable governing bodies, including but not limited to the Washington State Department of Health, for the design, construction and installation of the System.

Section 6.5 There shall have been no significant breach or failure to perform under the Design-Build Agreement by CH2M Hill.

ARTICLE VII.
INDEMNIFICATION

Section 7.1 Notwithstanding anything to the contrary contained in this Agreement, the City agrees and covenants to indemnify, defend and hold harmless WDSF and its trustees, officers, members, employees, agents and representatives from and against any and all causes of action, suits at law or equity or claims or demands and any costs, losses, liabilities, damages (including any special, indirect, incidental or consequential damages), judgments, lawsuits, claims and expenses

(including without limitation reasonable attorneys' fees and costs), of any nature, whether known or unknown, fixed or contingent, due or to become due, relating to, incurred in connection with, or arising out of any acts or omissions by the City or the operation of the System, including without limitation any breach of warranty or covenant hereunder. The City's obligations under this Section 7.1 shall not apply to the extent arising solely from WDSF's negligence or willful misconduct; provided, however, that to the extent that this Agreement constitutes a "covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property" within the meaning of RCW 4.24.115, the City's obligations under this Section 7.1 shall apply to the extent of the City's negligence.

Section 7.2 Notwithstanding anything to the contrary contained in this Agreement, to the maximum extent permitted by law, in no event shall WDSF be liable for any damages whatsoever (including, without limitation, direct, consequential, indirect, special, or incidental damages, or damages for loss of business profits, business interruption, loss of business information, or other pecuniary loss) arising out of the use or inability to use the System, under contract, tort (including negligence) or other cause of action and even if WDSF has been advised to the possibility of such damages.

Section 7.3 The foregoing indemnities specifically include, without limitation, claims brought by the City's employees against WDSF. THE FOREGOING INDEMNITIES ARE EXPRESSLY INTENDED TO CONSTITUTE A WAIVER OF THE CITY'S IMMUNITY UNDER WASHINGTON'S INDUSTRIAL INSURANCE ACT, RCW TITLE 51, TO THE EXTENT NECESSARY TO PROVIDE WDSF WITH A FULL AND COMPLETE INDEMNITY FROM CLAIMS MADE BY THE CITY AND ITS EMPLOYEES, TO THE EXTENT OF THEIR NEGLIGENCE. THE CITY AND WDSF ACKNOWLEDGE THAT THE INDEMNIFICATION PROVISIONS OF THIS ARTICLE WERE SPECIFICALLY NEGOTIATED AND AGREED UPON BY THEM.

ARTICLE VIII.
GENERAL

Section 8.1 Choice of Law. This Agreement shall be governed and interpreted according to the laws of the State of Washington. The Parties agree that Clallam County, in the State of Washington, shall be the exclusive and proper forum for any action or proceeding, including arbitration, if any, brought under this Agreement. The Parties accept the personal jurisdiction of such courts.

Section 8.2 Dispute Resolution. The Parties shall use reasonable, good faith efforts to cooperatively resolve any disputes that arise in connection with this Agreement. When a bona fide dispute arises between the City and WDSF subject to this Section 8.2 the parties shall each notify the other of the dispute, with the notice specifying the disputed issues and the position of the Party submitting the notice. If the Parties are unable to resolve a dispute within ten (10) business days, pursuant to this Section 8.2 either Party may proceed with any remedy available to it at law or in

E-7

equity.

Section 8.3 Remedies. Except as otherwise provided for herein, no remedy conferred by any of the specific provisions of the Agreement or available to WDSF is intended to be exclusive of any other remedy, and each and every remedy shall be cumulative and shall be in addition to every other remedy given hereunder, now or hereafter existing at law or in equity or by statute or otherwise. The election of any one or more remedies by WDSF shall not constitute a waiver of the right to pursue other available remedies. The City's sole and exclusive remedy from the City's use or inability to use the System or any breach of this Agreement by WDSF shall be for the City to discontinue use of the System or to repair or modify the System at the City's election and sole expense or, when applicable, to pursue legal remedies under the Design-Build Agreement.

Section 8.4 Amendments. This Agreement may be amended, supplemented or modified only by a writing dated and signed by both Parties.

Section 8.5 Assignment. Except as specifically provided in this Agreement, neither Party may assign or transfer this Agreement or any of its rights hereunder, or delegate any of its duties hereunder, without the prior written consent of the other Party. Any attempted assignment, transfer, or delegation in contravention of this Section 8.5 shall be null and void. This Agreement shall inure to the benefit of and be binding on the Parties hereto and their permitted successors and assigns.

Section 8.6 Severability. If any provision of this Agreement is invalid or unenforceable, the other provisions herein shall remain in full force and effect in such jurisdiction and shall be liberally construed in order to effectuate the purpose and intent of this Agreement, and the invalidity or unenforceability of any provision of this Agreement in any jurisdiction shall not affect the validity or enforceability of any such provision in any other jurisdiction.

Section 8.7 Waiver. Any failure or delay by either Party to exercise or partially exercise any right, power or privilege hereunder shall not be deemed a waiver of any of the rights, powers or privileges under the Agreement. No term or condition of this Agreement shall be held to be waived, modified or deleted except by a written instrument signed by the Parties hereto. No such waiver, modification or deletion in any one instance shall be deemed to be a waiver, modification or deletion of a term or condition in any other instance, whether like or unalike. Waiver of any breach of any term or condition of this Agreement shall not be deemed a waiver of any prior or subsequent breach.

Section 8.8 Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and is not subject to amendment or modification except as provided herein.

Section 8.9 Force Majeure. Neither party shall be deemed to be in violation of this Agreement if such party is prevented from performing any of its obligations hereunder for any reason beyond its control, including without limitation, acts of God or of any public enemy, elements, flood, strikes, or an injunction or other judicial decision.

Section 8.10 Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the Parties thereto and their respective successors and assigns.

Section 8.11 Section Headings. The headings of sections in this Agreement are for reference only and shall not affect the meaning of this Agreement.

Section 8.12 Survival. The terms and conditions contained in the Agreement that by their sense and context are intended to survive the performance of the Agreement by the Parties shall so survive the completion of the performance, cancellation or termination of the Agreement, including without limitation Section 2.4, Section 2.5, Article VII and Article VIII.

IN WITNESS WHEREOF, the Parties have caused their duly authorized representatives to execute this Agreement as of the date written below.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC

By: _____
Name: Tracy E. Garland
Its: President and CEO
Date: _____

CITY OF PORT ANGELES, WASHINGTON

By: _____
Name: Richard A. Headrick
Its: Mayor
Date: March 1, 2005

Approved as to form:

_____
William E. Bloor
City Attorney

Attest:

_____
Becky Upton
City Clerk

APPENDIX F - COPIES OF RELEVANT LAWS

RCW 35A.70.070

Public health and safety, general laws applicable.

Every code city may exercise the powers authorized and shall perform the duties imposed upon cities of like population relating to the public health and safety as provided by Title 70 RCW and, without limiting the generality of the foregoing, shall: (1) Organize boards of health and appoint a health officer with the authority, duties and functions as provided in chapter 70.05 RCW, or provide for combined city-county health departments as provided and in accordance with the provisions of chapter 70.08 RCW; (2) contribute and participate in public health pooling funds as authorized by chapter 70.12 RCW; (3) control and provide for treatment of *venereal diseases as authorized by chapter 70.24 RCW; (4) provide for the care and control of tuberculosis as provided in chapters 70.28, 70.30, **70.32, and 70.54 RCW; (5) participate in health districts as authorized by chapter 70.46 RCW; (6) exercise control over water pollution as provided in chapter 35.88 RCW; (7) for all code cities having a population of more than twenty thousand serve as a primary district for registration of vital statistics in accordance with the provisions of chapter 70.58 RCW; (8) observe and enforce the provisions relating to fireworks as provided in chapter 70.77 RCW; (9) enforce the provisions relating to swimming pools provided in chapter 70.90 RCW; (10) enforce the provisions of chapter 18.20 RCW when applicable; (11) perform the functions relating to mentally ill prescribed in chapters 72.06 and 71.12 RCW; (12) cooperate with the state department of social and health services in mosquito control as authorized by RCW 70.22.060; and (13) inspect nursing homes as authorized by RCW 18.51.145.

[1987 c 223 § 4; 1985 c 213 § 12; 1981 1st ex.s. c 2 § 25; 1979 c 141 § 42; 1967 ex.s. c 119 § 35A.70.070.]

Notes:

Reviser's note: *(1) The term "venereal diseases" was changed to "sexually transmitted diseases" by 1988 c 206.

**(2) Chapter 70.32 RCW was repealed and/or recodified in its entirety pursuant to 1999 c 172.

Savings -- Effective date -- 1985 c 213: See notes following RCW 43.20.050.

Severability -- Effective date -- 1981 1st ex.s. c 2: See notes following RCW 18.51.010.

F-1

RCW 70.142.010

Establishment of standards for chemical contaminants in drinking water by state board of health.

(1) In order to protect public health from chemical contaminants in drinking water, the state board of health shall conduct public hearings and, where technical data allow, establish by rule standards for allowable concentrations. For purposes of this chapter, the words "chemical contaminants" are limited to synthetic organic chemical contaminants and to any other contaminants which in the opinion of the board constitute a threat to public health. If adequate data to support setting of a standard is available, the state board of health shall adopt by rule a maximum contaminant level for water provided to consumers' taps. Standards set for contaminants known to be toxic shall consider both short-term and chronic toxicity. Standards set for contaminants known to be carcinogenic shall be consistent with risk levels established by the state board of health.

(2) The board shall consider the best available scientific information in establishing the standards. The board may review and revise the standards. State and local standards for chemical contaminants may be more strict than the federal standards.

[1984 c 187 § 1.]

F-2